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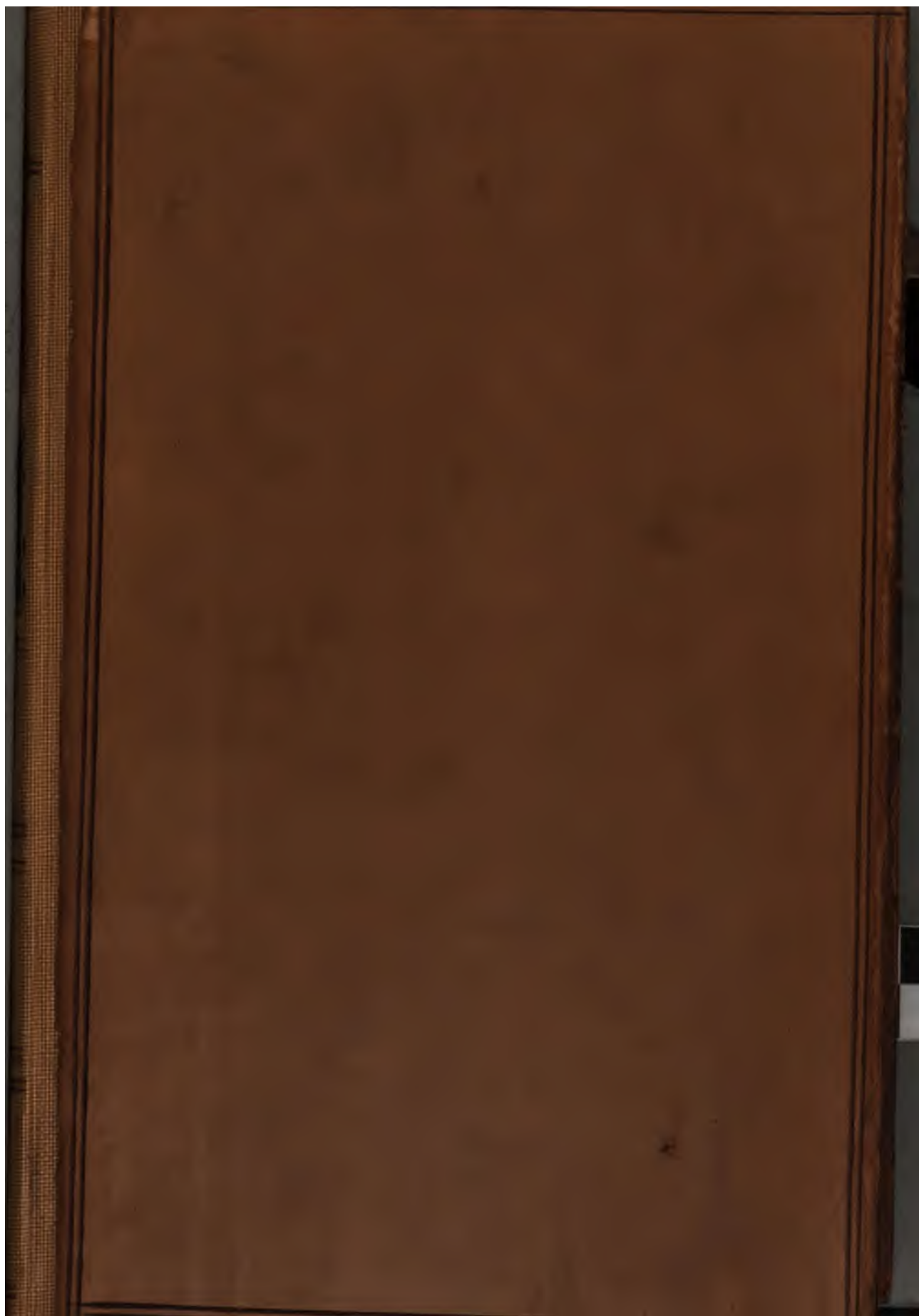
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**REPORTS**  
**OF**  
**CASES IN CHANCERY,**

**ARGUED AND DETERMINED**

**IN**  
**THE ROLLS COURT**

**DURING THE TIME OF**

**THE RIGHT HONORABLE**  
**SIR JOHN ROMILLY, KNIGHT,**  
**MASTER OF THE ROLLS.**

**BY**  
**CHARLES BEAVAN, ESQ., M.A.,**  
**BARRISTER AT LAW.**

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A.	PAGE		PAGE
Abadom v. Abadom .....	243	Bone v. Pollard .....	283
Alsop v. Bell .....	451	Bown v. Stenson .....	631
Askey, Birds v. ....	615, 618	Boys, Austen v. ....	598
Attorney-General v. Bushby ..	299	Brealy's Settled Estate, Re ..	220
----- v. The Dean		Brett, Noble v. ....	499
and Canons of Windsor ....	679	Bridges v. Longman .....	27
----- v. Trinity Col-		Bridgman v. Gill. ....	302
lege .....	383	Brown v. Oakshott .....	254
Austen v. Boys .....	598	Browne v. Butter. ....	159
		Bushby, Attorney-General v. ..	299
		Butcher, Tracy v. ....	438
		Butter, Browne v. ..	159
B.		C.	
Barrett, Waller v. ....	413	Campbell, Mecklan v. ....	100
Barrow v. Wadkin .....	1, 327	Cavendish v. Geaves .....	163
Beckett, Daly v. ....	114	Cave, Sheaf v. ....	259
Bell, Alsop v. ....	451	Carron Company, Stainton v. ..	346
Bellingham, Earle v. ....	445, 448	Cheeseman v. May .....	207
Bell, Mocatta v. ....	585	Chichester v. Chichester. ....	289
Benwell v. Inns .....	307	Clements v. Hall .....	333
Biggenden, May v. ....	207	Collinson v. Collinson .....	269
Birds v. Askey .....	615, 618	Cooke, Jeans v. ....	513
Biron v. Mount .....	642		
Blandy v. Kimber .....	148		



	PAGE		PAGE
Cowan, Laing <i>v.</i> . . . . .	112	Fox <i>v.</i> Yates . . . . .	271
Cowdray <i>v.</i> Cross . . . . .	445	Freeland, Lefevre <i>v.</i> . . . .	403
Cregoe, Gully <i>v.</i> . . . . .	185	Fuller <i>v.</i> Green . . . . .	217
Croft <i>v.</i> Goldsmid . . . . .	312		
—, Roberts <i>v.</i> . . . . .	223		
Cromford, &c. Railway Com- pany <i>v.</i> The Stockport, Dis- ley and Whaley Bridge Rail- way Company . . . . .	74		
Cross, Cowdray <i>v.</i> . . . . .	445		
		G.	
D.		Geaves, Cavendish <i>v.</i> . . . .	163
Daly <i>v.</i> Beckett . . . . .	114	Gill, Bridgman <i>v.</i> . . . . .	302
Daniel, Randall <i>v.</i> . . . . .	193	Goldsmid, Croft <i>v.</i> . . . . .	312
Davey <i>v.</i> Durrant. . . . .	411, 493	Gould, In re . . . . .	442
Deacon, Pearl <i>v.</i> . . . . .	186	Graham, <i>v.</i> Wheaton . . . . .	483
Dean and Canons of Windsor, Attorney-General <i>v.</i> . . . .	679	Green, Fuller <i>v.</i> . . . . .	217
De Vitre, Jeffery <i>v.</i> . . . . .	276	Green's Patent, Re . . . . .	145
Devaynes <i>v.</i> Robinson . . . . .	86	Gully <i>v.</i> Cregoe . . . . .	185
Dixon <i>v.</i> Dixon . . . . .	129		
D'Oechsner <i>v.</i> Scott . . . . .	239		
Durrant, Davey <i>v.</i> . . . . .	411, 493		
		H.	
E.		Hadwen's Settled Estates, Re . . .	220
Earle <i>v.</i> Bellingham . . . . .	445, 448	Hall, Clements <i>v.</i> . . . . .	333
Electric Telegraph Company of Ireland. . . . .	137, 318, 321	Hammersley, Johnson <i>v.</i> . . . .	498
Ellis' Settlement, Re . . . . .	426	Harcourt, Somerset Coal Canal Company . . . . .	571
		Haynes, Yeomans <i>v.</i> . . . . .	127
F.		Holgate <i>v.</i> Jennings. . . . .	623
Feakes <i>v.</i> Standley . . . . .	485	Horsfall, Smith <i>v.</i> . . . . .	331
Findon <i>v.</i> Findon. . . . .	83	Hughes, Williams <i>v.</i> . . . . .	474
Fletcher, Wynne <i>v.</i> . . . . .	430	Humble <i>v.</i> Humble. . . . .	535
Foster, In re . . . . .	428		
Foster's Settled Estates, Re . .	220		
Fowler <i>v.</i> Wyatt . . . . .	232		
		I.	
		Inns, Benwell <i>v.</i> . . . . .	307
		Irby <i>v.</i> Irby. . . . .	525
		J.	
		Jeans <i>v.</i> Cooke . . . . .	513
		Jeffery <i>v.</i> De Vitre . . . . .	276
		Jenkinson, Re . . . . .	64
		Jennings, Holgate <i>v.</i> . . . . .	623

TABLE OF CASES REPORTED.

vii

	PAGE
Johnson v. Hammersley .....	498
Jones v. Williams .....	47

K.

Kimber, Blandy v. ....	148
Knight v. Pocock .....	436

L.

Laing v. Cowan .....	112
Lawford v. Spicer .....	365
Lefevre v. Freeland.....	403
Lindsay v. Tyrrell .....	124
Longman, Bridges v. ....	27

M.

Mackay, Stephenson v. ....	252
Manson's Settled Estates ....	220
Maxwell v. Port Tennant, &c. Company .....	495
Maxwell's Case .....	321
Will, In re .....	246
May v. Biggenden .....	207
—, Cheeseman v.....	207
—, Page v. ....	323
Meiklan v. Campbell .....	100
Mocatta v. Bell .....	585
Moreland v. Richardson .....	33
Morse, Sturgis v. ....	541
Mount, Biron v. ....	642

N.

Nicholl's case .....	639
Nicholls, Pellatt v. ....	298
Noble v. Brett .....	499

O.

Oakshott, Brown v.....	254
------------------------	-----

	PAGE
O'Connor v. Sierra Nevada Company .....	435

P.

Packman v. Vivian .....	290
Page v. May .....	323
—, Williams v. ....	490, 654
Paine v. Ryder.....	151
Paylor v. Pegg.....	105
Pearce, In re .....	491
— v. Wrigton .....	253
Pearl v. Deacon .....	186
Pearson v. Spencer .....	266
Pegg, Paylor v. ....	105
Pellatt v. Nicholls .....	298
Pocock, Knight v. ....	436
Pollard, Bone v. ....	283
Port Tennant, &c. Company, Maxwell v. ....	495
Priestman v. Tindall .....	244

R.

Randall v. Daniel .....	193
Reade v. Woodroffe.....	421
Reid's case .....	318
Restal, Sparks v.....	218
Richardson, Moreland v.....	33
Roberts v. Croft .....	223
Robinson, Devaynes v. ....	86
Ryder, Paine v. ....	151

S.

St. George's Harbour Com- pany, Williams v. ....	339
Scott, D'Oechsner v. ....	239
Scott v. Scott .....	263
—, Tugwell v.....	141

	PAGE		PAGE
Seaman v. Woods .....	372	U.	
Sheaf v. Cave .....	259	University of London v. Yar-	
Sierra Nevada Company, O'Con-		row .....	472
ner v. ....	435		
Skirving v. Williams .....	275	V.	
Smith v. Horsfall .....	331	Vivian, Packman v. ....	290
Somerset Coal Canal Company			
v. Harcourt .....	571		
Sparks v. Restal .....	218	W.	
Spencer, Pearson v. ....	266	Wadkin, Barrow v. .... 1,	327
Spicer, Lawford v. ....	365	Waller v. Barrett .....	413
— v. Spicer .....	365	Wheaton v. Graham .....	483
Stainton v. Carron Company ..	346	Williams v. Hughes .....	474
Standley, Feakes v. ....	485	—, Jones v. ....	47
Stenson, Bown v. ....	631	— v. Page .....	490, 654
Stephenson v. Mackay .....	252	— v. St. George's Har-	
Stockport, Disley and Whaley		bour Company ....	339
Bridge Railway Company,		—, Skirving v. ....	275
Cromford, &c. Railway Com-		Woodroffe, Reade v. ....	421
pany v. ....	74	Woods, Seaman v. ....	372
Sturgis v. Morse .....	541	Wrigton, Pearce v. ....	253
Swinfen v. Swinfen .....	549	Wyatt, Fowler v. ....	232
		Wynne v. Fletcher .....	430
T.		Y.	
Tindall, Priestman v. ....	244	Yarrow, University of London v.	472
Tracy v. Butcher .....	433	Yates, Fox v. ....	271
Trinity College, Attorney-Gener-		Yeomans v. Haynes .....	127
al v. ....	383		
Tugwell v. Scott .....	141		
Tyrrell, Lindsay v. ....	124		

# REPORTS

OF

## CASES

ARGUED AND DETERMINED

IN

### THE ROLLS COURT.

1857.

#### BARROW v. WADKIN.

April 24, 25.

May 30.

THE testator, who died in 1843, devised some real estates to his widow for life, and after her decease unto and to the use of the Defendant *Wadkin* and four other trustees, and their heirs, in trust for *Elizabeth Barrow*, "so long as she should live the wife or widow of *John Barrow*," for her separate use, without power of anticipation, and after her decease or marriage again, upon trust that they should stand seised thereof upon trust for the children of *John Barrow* and *Elizabeth* his wife, and their heirs.

This Court will enforce, for the benefit of the Crown, a trust of real estate created in favour of an alien. The devise being valid, and there being a *cestui que trust*, who can take but not hold, the Crown becomes entitled beneficially, and not the trustee or heir at law.

The widow died in 1848. *Elizabeth Barrow*, and all her children, were aliens.

*Riddison v. Sturdy* (3 *Smale & Giffard*, 230) dis-sented from.

The bill in this case was filed by the devisees in trust against the trustees, the heir at law and the *Attorney-General*, praying that the trusts of the will might be

1857.

BARROW  
v.  
WADKIN.

carried into execution, and the rights of the parties ascertained.

The cause came on upon a motion for a decree. The question was, whether the trustees, the heir or the Crown took the estate; the trustees and heir, by arrangement, did not argue the case as against each other, but only as against the Crown.

Mr. *R. Palmer*, for the Plaintiffs, cited *Doe d. Thomas v. Acklam* (a); *Doe d. Auchmuty v. Mulcaster* (b); *Fitch v. Weber* (c); 4 *Geo.* 2, c. 21; 13 *Geo.* 3, c. 21, s. 3; 7 & 8 *Vict.* c. 66, ss. 14, 16 (d); 1 *Chitty's Statutes* (e).

Mr. *E. R. Turner* for *John Barrow*, of *Lancaster*, the heir at law of the testator. I admit that all the text books lay down the proposition, that the Crown would take all the interest intended to be given to an alien, when a trust is declared of real estate in favour of an alien. This appears in *Attorney-General v. Sands* (f), where *C. J. Hale*, then Chief Baron, said (g), "I hold that such a trust in an alien is forfeitable and will belong to the King, as it was held in *Tr. 23 Car.* in *Holland's Case*, and the reason is, because an alien has no capacity to purchase for the benefit of any other but of the King; and it would otherwise be inconvenient that aliens should receive the profits of lands to their own use, and the mischief would be the same as if aliens purchased the lands themselves; but in that case the King is entitled to the profits only, the land itself is not forfeited to him."

This

(a) 2 *Barn. & Cres.* 779.

(b) 5 *Barn. & Cres.* 771.

(c) 6 *Harc.* 51.

(d) Passed 6th August, 1844.

(e) Page 16, *Welsby and Beavan's* edition.

(f) *Hadres' R.* 488.

(g) *Ibid.* 495.

This, however, is a mere *obiter dictum* and is of no authority: for, in the first place, he speaks of the "forfeiture" of the interest of an alien, and it was solemnly decided in *Attorney-General v. Duplessis* (a), by the House of Lords, that there was no forfeiture in such a case; in the next place, C. J. *Hale*, who "on the subject of trusts followed, to a degree, the errors of the time, and applied to trusts what had made uses intolerable," (per Lord *Mansfield*, C. J. (b),) was no great authority on such a matter; and lastly, the whole *dictum* turned on *Holland's Case* (c), in which the King had, after office found, seized a copyhold estate held in trust for an alien, but, in fact, that case does not support the *dictum*, for the ultimate judgment in that case was against the King. On these grounds, therefore, the text books are unsupported by authority.

1857.

BARROW  
v.  
WADKIN.

Next, the Crown, in this case, is not at present in a position to claim any interest in the property, as there has not been as yet any office found, and the Crown cannot take without title by record; *Doe v. Redfern* (d). [This point he waived, on an intimation from the Court that the only effect would be to delay the settlement of the main question until the office had been found.]

Thirdly, on principle and authority the Crown is not entitled. Actions at law are of three natures: First, those strictly personal, as to which it is clear that all alien friends may sue in the English Courts. Secondly, mixed actions, which cannot be sustained by any alien; *Doe d. Thomas v. Acklam* (e); and thirdly, real actions, which

(a) 2 *Ves. sen.* 286, 287; 1 *Bro. P. C.* 415 (2nd ed.)

(b) *Burgess v. Wheate*, 1 *Eden*, 177, 222.

(c) *Styles R.* 20, 40, 75, 84, 90, 94.

(d) 12 *East*, 109.

(e) 2 *Barn. & Cr.* 779.

1857.  
  
 BARROW  
 v.  
 WADKIN.

which *à fortiori* cannot be brought by an alien; *Co. Litt. (a)*; *Dyer (b)*. All suits in equity concerning landed property stand, at least, as high as mixed actions, which is proved by the fact that a plea may be put in to a bill in such a suit, if it be for land within a county palatine (*c*), on the authority of *Calvin's Case (d)*, where, besides the assize, there was a suit in Chancery for evidence concerning lands of inheritance; *Burk v. Brown (e)*; and there does not seem to be any necessity to plead the objection; *Ex parte Boussmaker (f)*. If the alien could not enforce the trust in equity, neither could the Crown, who stands in his place, enforce the trust as against the trustee, who has a legal right to hold as against the alien and all the world. The Crown, on office found, merely takes that of which the alien was possessed, and the right to a real action did not pass to the Crown, as is proved by the case of an alien widow, where neither she nor the Crown take anything on the death of her husband. Before the Statute of Uses, the King would not take an use declared for an alien; *Gilbert on Uses and Trusts (g)*, and the recital prefacing the Statute of Uses, which states that by reason of "assurances to uses, confidence and trusts," &c. . . . "the King's highness hath lost the property and advantages of the lands of persons attainted, and of the lands craftily put in feoffments *to the use of aliens born.*" It would be unequitable that the Crown should take, both in the case of the trustee being an alien and the *cestui que trust* a natural-born subject, and also in the case of the trustee being a natural-born subject and the *cestui que trust* an alien; and it being clear, that the  
 Crown

(a) Page 129 b. (e) 2 *Atk.* 397.  
 (b) Vol. 1, p. 2 b, pl. 8. (f) 13 *Ves.* 71.  
 (c) *Milford's Eq. Pl.* 223 (4th ed.) (g) 3rd ed. by *Sugden*, pp. 86, 87.  
 (d) 7 *Rep.* 1.

Crown would take in the former case discharged of the trusts, (as appears from the Escheat Act,) it follows that the Crown would not be entitled in the converse case. The Crown has no other prerogative than forfeiture or escheat in such a case; *Henchman v. Attorney-General*(a); and the late Vice-Chancellor of *England* expressed a very strong opinion against the right of the Crown in *Burney v. Macdonald* (b).

1857.  
  
 BARROW  
 v.  
 WADKIN.

Lastly, there is an express authority against the Crown in *Rittson v. Stordy* (c).

He referred to several passages from the case of *Burgess v. Wheate* (d), *Hughes v. Wells* (e), and *Du Hourmelin v. Sheldon* (f).

Mr. *Follett*, for the trustees, submitted that in no case would this Court enforce a trust in favour of the Crown; *Burgess v. Wheate* (g); that there was no intention, on the part of the testator, to benefit the Crown at the expense of his heir, who could not be disinherited except by a clear expression of intention in favour of some other person capable of enjoying. That the reasons for the Crown's taking an alien's estate (h) did not apply to the present case, where natural born subjects were seised of the estate and were in possession. That the Crown came under no head of equity (i); that the case came within the principle of *Walker v. Denne* (k), and *Taylor v. Haygarth* (l); and the trustees were entitled

- |   |  |
|---|--|
| (a) 3 <i>Myl. &amp; K.</i> 485, 492, 493, 495.              | <i>Craig.</i> 525.   |
| (b) 15 <i>Simons</i> , 6, 14.                               | (g) 1 <i>Eden</i> , 199, 204, 207, 244, 245.                   |
| (c) 3 <i>Smale &amp; Giffard</i> , 230.                     | (h) <i>Collingwood v. Pace</i> , Sir Orlando Bridgman, p. 431. |
| (d) 1 <i>Eden</i> , 177, 188, 189, 198, 199, 219, 228, 229. | (i) 2 <i>Ves. jun.</i> pp. 184, 185.                           |
| (e) 9 <i>Hare</i> , 749.                                    | (k) 2 <i>Ves. jun.</i> 170.                                    |
| (f) 1 <i>Beav.</i> 79, and 4 <i>Myl. &amp;</i>              | (l) 14 <i>Sim.</i> 16.   |



1857.



BARROW

v.

WADKIN.

entitled to retain, as against the Crown, the interest of the alien.

Mr. *Wickens*, for the Crown. The authority of the *dictum* of Chief Justice *Hale* is not to be impeached merely because he described the loss of an estate by an alien as a “forfeiture,” for it is manifest that he used the expression in a loose way; while the Judges, in *Attorney-General v. Duplessis* (a), employed that term in a more strict and technical manner. The *King v. Holland* is reported in several different books (b); *Saunders on Uses and Trusts* (c); and, on the whole, that case does support the *dictum* of Chief Justice *Hale*. *Burgess v. Wheate* (d) carries the law of real property to the extremest limit against the Crown, and the authority of that case was considerably doubted by Lord *Thurlow* in *Middleton v. Spicer* (e), though I admit it must here be taken to be law. The whole of the judgment of Sir *Thomas Clarke* was in favour of the Crown; and he quoted the cases of *King v. Holland*, and *Attorney-General v. Sandys* with approval. The right of the Crown depends first on forfeiture; secondly, on prerogative; and thirdly, on escheat; but in *Burgess v. Wheate* the whole reasoning turned on escheat, which depended on feudal tenures, and on principles inapplicable here. The Crown constantly takes equitable rights, upon office found, and enforces them in this Court; thus by attainder, there is a forfeiture of an equitable estate to the Crown, as in the case of *Tawell* the Quaker, who a few years since was convicted of murder. The right of the Crown to the interest of an alien *cestui que trust* in realty was recognized by an express recital in the statute

(a) 1 Bro. P. C. 415 (2nd ed.) pl. 8.

(b) *Aleyn*, 14; *Style*, 20; 1  
Roll. Abr. 194; *Hardres*, 405;  
and see 2 Vin. 2nd ed. p. 258,

(c) Vol. i. pp. 309, 312 (5th ed.)

(d) 1 *Eden*, 177.

(e) 1 Bro. C. C. 201.

statute 47 Geo. 3, st. 2, c. 24, and the incapacity of aliens to hold lands was founded upon political and feudal reasons, *Du Hourmelin v. Sheldon* (a), which were just as applicable to equitable as to legal estate. In the case of *Rittson v. Stordy* (b), coming before the Lords Justices, the Counsel for the Plaintiff declined to argue the case upon the grounds on which the judgment of the Court below had been founded.

1857.  
  
 BARROW  
 v.  
 WADKIN.

Mr. *E. R. Turner* added, that neither side quoted the point actually decided in *Burgess v. Wheate* (c), as an authority in their favour, and that the *dicta* of Lord *Mansfield* were of greater weight than those of the Master of the Rolls, and especially on the points then in question; that the real principle with regard to the incapacity of an alien to hold land was corruption of blood, *Rittson v. Stordy* (d), as was shewn by the case of a child of an alien father by a natural born subject succeeding to his mother's real property. That in the case, which was looked upon as very nearly the same as that of trustee and *cestui que trust* in the time of Chief Justice *Hale*, viz., that of a lord of a manor and a copyhold tenant, the interest of an alien copyhold tenant went to the lord and not to the Crown (e).

Mr. *R. Palmer* in reply referred to the question as to the necessity of taking the Lord's Supper under the Act of 7 & 8 Vict. c. 66, s. 14; *Fitch v. Weber* (f).

*The MASTER of the ROLLS.*

I will take time to consider this case.

*The*

(a) 4 *Mylne & Cr.* 525, 532.

(b) 2 *Jur. N. S.* 410.

(c) *Eden*, 177.

(d) 2 *Jur. N. S.* 410.

(e) *Dyer*, 1, 2 b, pl. 8, in margin.

(f) 6 *Hare*, 51.

1857.

BARROW

v.

WADKIN.

May 30.

*The MASTER of the ROLLS.*

A question of considerable importance and some nicety is involved in the present suit.

*Thomas Barrow* by his will, dated the 28th of *June*, 1843, devised certain real estate in this country to his wife, *Sarah*, during her life, and after her decease, to five trustees and their heirs, in trust to pay the rents to such persons and for such purposes as *Elizabeth*, the wife of *John Barrow*, of *Shaneateles*, in the United States of *America*, should direct, without anticipation, and in default, to her for her separate use, and after her decease or second marriage, as to part in trust for the three sons of the said *John Barrow* and *Elizabeth* his wife, and as to another portion in trust for all the children of *John Barrow* and *Elizabeth* his wife, and their heirs, other than and except the three sons already named.

The testator died in *July*, 1843, and his widow died in 1848.

*Elizabeth*, the wife of *John Barrow*, of *Shaneateles*, and all her children are aliens.

The question arises, who is entitled to the benefit of the devise ?

The claimants are nominally three, viz., the four devisees in trust, the heir at law, and the Crown ; practically, the first two claim nominally, admitting their intention, if they should be held to be entitled, to give the benefit of the devise to the persons pointed out as such by the testator.

The

The real and only question of any difficulty is, whether the Crown can take the benefit of this devise in trust for aliens. If not, I think that no question can arise between the trustees and the heir at law. Here is a clear devise to trustees upon trust, they, therefore, were not intended to take beneficially; if the trust on which they are directed to hold the property is void, there is a resulting trust for the heir of the devisor; this is the ordinary case of frequent occurrence, and similar to a devise of land to trustees, in trust for charitable purposes, in which case, the trust being void, the heir of the devisor is entitled to the beneficial interest. If the intended *cestui que trust* cannot take, then the heir of the devisor becomes the *cestui que trust*, and can require the trust to be executed for his benefit. The trustees can take only in the event of there being no heir of the devisor, that is, no *cestui que trust*, which was the case in *Burgess v. Wheate* (a), in which case it was decided that there was no escheat to the Crown of the real estate held in trust by the trustees.

The first question, therefore, to be considered is, whether this trust of real estate in favour of aliens is void, because if it is, then I think it clear that the Crown can take no interest. If not void, then the next question is, whether the Crown can enforce the execution of the trust, so as to obtain the benefit of this devise in favour of aliens.

With respect to the first question, I am unable to discover on which principle this can be held to be a void trust. If void, it must be so either by enactment of some positive statute or by operation of law. With respect to any enactment by statute, none has been pointed

1857.

BARROW  
v.  
WADKIN.

(a) 1 *Eden*, 177.

1857.

BARROW  
v.  
WADKIN.

pointed out to me, nor am I, myself, aware of any statute affecting the question, and it may, I think, be treated as a fact, that no statute exists, declaring that a trust of real estate in favour of an alien is void. If it be not void by statute, then is it void by operation of law? in other words, by the common law, is a trust of land in favour of an alien void? This also is a proposition which must be answered in the negative; it is unsupported by authority or principle. It is quite clear that a devise of the legal estate in fee simple to an alien is good, he takes the land, although he cannot hold it; the devise is not void, but takes effect in him, although not for his benefit. This, if authority were wanted for it, is expressly laid down by Lord *Hardwicke* in *Burk v. Brown* (a). "An alien," he says, "can take by purchase, but cannot hold." If a direct devise of the legal estate to an alien is valid, on what principle it could be held, that a devise of land in trust for him is void, I am at a loss to understand. There is certainly no authority that I have been referred to, or that I have discovered, that establishes any such proposition.

It is said, however, that the trust cannot take effect, and that where a trust cannot take effect it enures for the benefit of the heir. But this is only an instance of a doubt created by the use of vague language. The expression "cannot take effect" is ambiguous; a trust may fail of taking effect by reason of its being *ipso facto* void, or without its being void, by reason of the *cestui que trust* being unable to enforce the execution of it. So far as relates to the former branch of the alternative, I have disposed of it, in what I have already said; so far as relates to the latter branch of the alternative,

(a) 2 *Atk.* 397.

native, it is involved in the second proposition which I am about to consider, viz., whether this is a trust which can be enforced by or for the benefit of the Crown. In considering, therefore, this question, I shall assume that I am right in the conclusion to which I have already come, that a trust in favour of an alien is not in itself or *ipso facto* void.

1857.  
  
 BARROW  
 v.  
 WADKIN.

I think it desirable to consider how this matter would stand on principle, if it were not affected by any authority, and then examine the principal decisions and *dicta* which relate to this subject.

Where a trust exists, the trust must be executed on behalf of the *cestui que trust* or on behalf of all those who claim by or under him. This proposition requires no authority for its support, but I have stated it in the words employed by Lord *Henley* in his judgment in *Burgess v. Wheate* (a). I find no exception stated, the proposition is general and universal. The alien is the *cestui que trust*, and therefore it follows, as a necessary conclusion, that the trust must be executed on his behalf. It is argued, however, that the case of an alien constitutes an exception, and that the alien cannot enforce the execution of a trust, because he cannot derive any benefit from it; for which proposition *Burney v. Macdonald* (b) is cited, but I am unable to understand the value of that argument, either in a technical or practical sense. As a technical rule of law, it is true that the alien derives no benefit from the execution of the trust, but I apprehend that this Court enforces the execution of all legal trusts in the popular sense of that term, without regard to the value which

(a) 1 *Eden*, 251.

(b) 15 *Sim.* 6.

1857.

BARROW  
v.  
WADKIN.

which the *cestui que trust* may derive from it. I say "legal trusts," because if not legal it is *ipso facto void*, and I have already shewn that this trust is valid. Practically, though not technically, the alien may derive great benefit from the enforcement of the execution of the trust; for if executed and the land be seized by the Crown, the Crown might, and probably would, allow the land to be sold, and the proceeds of it, or what remained after payment of the expenses, to be paid to the alien for his benefit; whereas, if not executed at all, the heir at law or the trustee would take beneficially, and the alien would be deprived of all benefit of the devise.

It is impossible to take into consideration the fact alleged at the Bar, that the trustee or the heir at law intend to give the alien the benefit of this estate; the case must be decided on exactly the same principles as if they were claiming to hold for their own benefit. It is obvious that the law does not depend on the liberality or sense of justice of the trustees or the heir.

If, then, the case arise of a legal trust, where the alien, who is a *cestui que trust*, desires and insists that the trust shall be executed in his behalf, and who believes that by so doing he shall gain advantages which he cannot otherwise obtain, it seems to me to be difficult, on principle apart from authority (if I may use and comment on the expression employed by the Vice-Chancellor of *England* in the case of *Burney v. Macdonald*), to say, that there would not be a violation of justice in refusing to execute, on his behalf, the trust of the property which he could not hold, but from taking which, he alleges and believes, that he would derive a benefit; and instead of so doing, in giving the land to persons  
whom

whom the devisor never intended to have it, and from whom the alien will derive no advantage whatever. Even if the alien derived no advantage, in a pecuniary point of view, he might prefer the Crown to the heir at law. Nor do I understand, on principle, why this Court should favour one more than the other.

1857.

BARROW  
v.  
WADKIN.

But against this view of the case, and in support of the argument urged, a passage is cited from *Gilbert* on Uses (a) to this effect, viz. :—that though a use may be raised to an alien, he cannot compel the feoffees to execute the use; and the King cannot seize the land of an alien, unless it be executed in him by a decree in Chancery, for there is no right in the *cestui que use* to seize the lands without a decree, and the King has only the rights of the *cestui que use*. The whole passage is this:—"The King shall have the uses of an alien upon his purchase (b); for the advantage a man receives from his duty can extend no further than the obligation of that duty reaches, but the allegiance of an alien is temporary, therefore so is his property, and since he is incapable of perpetualness of subjection, he cannot be protected in any estate that is of perpetual continuance; and the inconvenience is the same if this be a freehold at law or a trust. But in this case the King shall not seize the land of an alien, unless it be executed in him by a decree in Chancery; for there was no right in the *cestui que use* to seize the lands without a decree, and the King has only the right of the *cestui que use*. Q."

*Holland case*,  
*All.* 14; *Sty.*  
40; *Att.-Gen.*  
*v. Sands*, 3  
*Cha. Rep.* 19,  
fol. ed. post,  
204.

The cases, however, which are cited by Chief Baron  
*Gilbert*,

- (a) Page 86 (3rd ed.) of the king." [Note by Sir Edward Sugden, the editor of the 3rd edition of *Gilbert*.]  
(b) "The cases referred to shew, that a trust for an alien will be executed for the benefit



1857.  
  
 BARROW  
 v.  
 WADKIN.

*Gilbert*, for this purpose, do not establish any such proposition as that laid down in the text, if intended in the sense applied in the arguments in this case. They are the cases on which I shall have presently to comment, viz. *Holland's Case* (a), and the case of Sir *George Sands* (b). The proposition, therefore, rests on Chief Baron *Gilbert's* sole authority.

But though it is not supported by the cases cited, it is contradicted by authority, for in *Godfrey* and *Dixon's Case* (c), where the Plaintiff, a natural born subject, brought an action of debt against the tenant of land, to recover arrear of rent under a lease from his elder brother, who was born an alien, and who claimed to have inherited the land from his father (originally an alien), but who had, after acquiring the land, obtained letters of denization, the Counsel, in argument, used this very argument, which was denied by the Court. The words of the report are these:—"And he," (that is, *George Crook*, the Counsel,) "said, that if a man doth covenant to stand seised to the use of his brother, an alien, that the same is not good, and the use will not rise. But that was denied by the Court." The expressions in the text of *Gilbert* also appear obviously too extensive, if used without some understood qualification; it cannot mean, that if an alien in this country enters upon and takes possession of lands not belonging to him, he cannot be impleaded for the recovery thereof at the suit of the rightful owner; and yet that would be the effect of giving the words in the text their full effect. If so, he would hold them against all the world, because the Crown could not take them, as they do not belong to the alien. I observe, also, that Sir *Edward Sugden*,

(a) *Styles*, 20.

(b) *Hardres*, 488.

(c) *Godbolt's Rep.* 275.

*Sugden*, in his note on this passage, states, that the cases referred to, viz., *Holland's Case* and *Sir George Sand's Case*, show, that a trust for an alien will be executed for the benefit of the King.

1857.

BARROW  
v.  
WADKIN.

On the best judgment, therefore, that I can give to this subject, I am not prepared to go the length of saying, that the alien cannot enforce the execution of this trust, nor do I find any direct authority to that effect, although there are *dicta* to that effect, in two very late cases, viz., *Burney v. Macdonald (a)*, and in *Rittson v. Stordy (b)*, but which *dicta* are contrary to the *dicta* found in the earlier cases to which I am about to refer.

If the alien can enforce the execution of such a trust, there is an end of the question ; but assuming that he cannot, does it necessarily follow, that the Crown cannot? In considering this question, it is important to guard against any misapprehension or ambiguity arising from the use of the word "forfeiture," or "escheat," or the like. This is clearly no case of escheat, it is also equally clear that it is no case of forfeiture or penalty ; that was expressly laid down in the *Attorney-General v. Duplessis (c)*, by the House of Lords, after obtaining the unanimous opinions of the Judges to that effect. It is nothing else than a trust, and if I am right in what I have already said, it is a valid trust on behalf of an alien. Can then the Crown claim the benefit of that trust, and enforce the execution of it, although the alien *cestui que trust* cannot? The proposition which I have above stated, in the words of Sir *Thomas Clarke*, is, that a trust must be executed on behalf of the *cestui que trust* and all those claiming by or under him. Does not the Crown

(a) 15 Sim. 6.

(b) 1 Jur. N. S. 771.

(c) 1 Bro. P. C. 415.

1857.

BARROW  
v.  
WADKIN.

Crown claim by or under the *cestui que trust*? If so, why is not the trust to be executed on behalf of the Crown? The answer given is this:—It is said that the Crown comes under no head of equity, and that it cannot enforce any equitable right whatever; this would appear to me to be a strange proposition, if it be law, considering what equity professes to be and what it really is. If the Crown be neither entitled to equity, nor required to perform it, (for the rights and obligations, in such a case, would, I apprehend, be reciprocal,) it would seem to be opposed to these principles which obtain in every other part of the law and jurisprudence of this country. The expression, however, is used in argument, as applicable to uses and trusts, and must be so treated in considering this point.

A modern case of *Taylor v. Haygarth* (a), is cited to support this proposition, but, on examination, it fails to establish any such general doctrine. In that case, a testatrix gave her real and personal property to trustees absolutely, in trust to sell and hold the proceeds in trust for such person as she should by codicil direct, and she died without making any codicil and without heir or next of kin.

The Vice-Chancellor of *England* stopped the reply, as to the personal estate, in these words:—"I will not trouble you to address any argument to me respecting that part of the testatrix's property which was personalty at her death. The three executors not only have legacies of equal amount given to them, but the personal property is bequeathed to them in trust; and as it is so bequeathed, they are precluded from claiming it for their own benefit, notwithstanding no trust is declared.

Lord

(a) 14 Sim. 8, 12.

Lord *Thurlow* concludes his judgment in *Middleton v. Spicer* in the following words:—‘The executors being excluded, and no relations to be found, I consider the executors as much trustees for the Crown as they would have been for any of the next of kin, if these could have been discovered.’ Those words are strictly applicable to the present case; and, therefore, I am of opinion that the Crown is entitled to the testatrix’s undisposed-of personal estate. That being my clear opinion, I will thank you to confine yourself, in your reply, to that portion of the testatrix’s property which was real estate at her death, and to which the position laid down by Lord *Loughborough* in *Walker v. Denne* (a), seems to be applicable, viz., that the Crown comes under no head of equity.”

1857.  
  
 BARROW  
 v.  
 WADKIN.

*Walker v. Denne* (a), the case referred to by the Vice-Chancellor of *England*, strictly applied to the real estate, and there it was held, that the Crown could not enforce the sale. That being so, *Burgess v. Wheate* (b), clearly applied, as there were then trustees in possession of the land, and there was not in existence any *cestui que trust*. In fact, in that case, there was no trust to perform. If the testatrix had left an heir, there would have been a resulting trust for that heir, and I apprehend that neither Lord *Loughborough* in *Walker v. Denne* (a), nor the Vice-Chancellor of *England* in this case of *Taylor v. Haygarth* (c), meant to lay down, that because the Crown could not enforce the execution of a trust to sell in favour of a non-existing person, that therefore the Crown could have no benefit of a trust for an existing person, the beneficial interest in which had, through that person, become vested

(a) 2 *Ves. jun.* 179.

(b) 1 *Eden*, 177.

(c) 14 *Sim.* 8.

1857.

BARROW  
v.  
WADKIN.

vested in the Crown. In truth, the very words of *Middleton v. Spicer* (a), quoted and relied on by the Vice-Chancellor of *England*, shew, that the personal estate was held in trust for the Crown, and I am not aware of any principle which should establish that a trust for the Crown of personal estate can be enforced, but that trust of real estate for the Crown cannot be enforced. I can well understand, that there shall be no forfeiture of a trust estate, and that there shall be no escheat of a trust estate; but this is quite distinct from saying, that the Crown shall not be entitled to the benefit of any trust whatever. The case is, in this respect, quite distinct from *Burgess v. Wheate* (b), which was a case where no *cestui que trust* existed. The difference may be illustrated by considering the case of a legal rent-charge issuing out of lands. This rent-charge, if granted to an alien in fee, would, I apprehend, after office found, vest in the Crown by prerogative, but not by forfeiture or by escheat; but if this rent-charge were granted to a natural born subject, and he died without an heir, the Crown would take nothing, but the rent-charge would cease, and fall into the estate for the benefit of the owner; it would be simply extinguished.

In the case before me, the Crown, by its prerogative, stands in the place of the alien devisee in trust; how can it be said, that its rights are less than those of a person, who, by purchase from the devisee of his interest, stands in the place of an ordinary natural-born subject, who is an equitable devisee under a devise in trust for his benefit, unless it be, that the Crown is unable to enforce a trust at all. I find it difficult to understand how this can be law; and I find it equally difficult to understand

(a) 1 Bro. C. C. 201.

(b) 1 Eden, 177.

stand how this latter proposition can be supported on principle; and unless the proposition can be carried to this extent, it appears to me, that the argument must fail altogether. If carried to that extent, it must follow, for instance, that a direct devise to the King of land by an equitable owner in fee would not take effect; but the trustee would keep the estate for his own benefit, or it would go to the heir at law against the expressed intention of the testator and real owner. If this be so, the Courts of Equity must have acted through ignorance or inadvertence, when they have constantly permitted the Crown to enforce trusts ever since they have existed without any question having been raised on the subject.

1857.

BARROW  
v.  
WADKIN.

Although this be not a case of forfeiture, it is useful to consider what occurs in cases where the interest of a *cestui que trust* becomes forfeited to the Crown, because if the benefit of the trust is in the Crown, the right of enforcing it must be the same, whether it comes to the Crown by forfeiture or prerogative. In cases of attainder and outlawry, the Crown takes the equitable interest of the person attainted and of the outlaw, and obtains possession of them through the instrumentality of this Court, and yet the same argument would apply. It might be said, neither the person attainted nor the outlaw can enforce the execution of the trust, because he cannot obtain the benefit of it, and the Crown can only enforce it through him.

The statute of 47 *Geo.* 3, sess. 2, c. 24, after reciting the 39 & 40 *Geo.* 3, c. 88, s. 12, and that doubts had arisen whether the powers given by that Act extended to hereditaments which had come to his majesty in right of his Duchy of *Lancaster*, or by reason that the same had been purchased by, or for the use of, or in trust for any alien or aliens, &c., and that it was ex-

1857.

BARROW  
v.  
WADKIN.

pedient that such doubts should be removed, enacts, "that in all cases in which his majesty had, in right of his Crown or of his Duchy of *Lancaster*, become entitled to any lands or hereditaments, either by escheat or forfeiture, or by reason that the same had been purchased by or for the use of or *in trust for any alien* or aliens, it should be lawful for his majesty to direct the execution of any trusts or purposes to which the same may have been directed to be applied, and to make grants of such lands or hereditaments to any trustee," &c. &c. Therefore expressly assuming the law to be, that estates held in trust for aliens pass to the Crown: all this must be wrong, if the contention now urged be correct.

On principle, therefore, it would appear to me to be clear, that the Crown might enforce a trust, the beneficial interest in which belonged to the Crown, although the *cestui que trust*, in whose favour the trust was raised, could derive no benefit from it.

Next, it is proper to consider, how this stands on authority. In *Sir Geo. Sand's Case* (a), Lord *Hale* expressly says, that a trust for an alien is forfeitable, and will belong to the Crown. The reporter uses the word forfeitable, which is inaccurate; but it is an inaccuracy of the reporter, as will appear from Chief Baron *Parker's* note of that judgment, to which I am about to refer. But it is express, that the trust belonged to the Crown, and yet this is the very case most relied upon in *Burgess v. Wheate* by the *Master of the Rolls* and the *Lord Keeper*. In the Chief Baron *Parker's* reports (b), he gives a full note of his own judgment in the *Attorney-General v. Duplessis*, decided in the Exchequer,

(a) *Hardres*, 495.(b) *Parker*, 144.

quer, and afterwards affirmed in the House of Lords. Several passages are important on this subject (a).

1857.

BARROW  
v.  
WADKIN.

The case of *Holland* is reported in six consecutive places, in *Styles* (b), in *Aleyn* (c), and also in *Roll's Abr.* (d) It does not, as it appears to me, in any of these reports, expressly state this conclusion which *Hale* refers to as being then decided, and the point did not, in fact, necessarily come before them. The decision, in fact, was against the Crown in that case, and although it does not decide the question before me, the Judges assumed, as the groundwork of their decision, that the trust could be enforced by the Crown. The case was this:—an alien had bought land, and had had it conveyed to a natural-born subject, in trust for him. The Crown seized the land. The Court granted an *amoveas manus*, and held, that the Crown could not dispossess the trustee, but that it must first get the trust executed in equity, and then take the land. But if the Crown cannot enforce the execution of that trust in equity, one of two consequences necessarily follows, both of which appear to me to lead to monstrous results. Either there is a ready device by which an alien may become the beneficial owner of land to any extent in this country; or if not, then a man whose name is used as a mere trustee for another who has not paid a penny of the purchase-money, shall be allowed, in violation of all equity and good conscience, to hold the land to the exclusion of the person who trusted him, who paid the money, and who received his solemn assurance of acting as a trustee under a deed executed. It can scarcely be, that either of those two propositions can be now held to be the law of this country. The question did not

(a) *Parker*, pp. 152—156.

(b) Page 20.

(c) Page 14.

(d) Page 194.



1857.

BARROW  
v.  
WADKIN.

not arise in *Burges v. Wheate* (a), but it seems to have been assumed in that case, even by the *Master of the Rolls* and *Lord Keeper*, that the Crown would be entitled to the benefit of a trust for an alien. Sir *Thomas Clarke* in his judgment says (a),—"Several cases have been mentioned to encounter *Sand's Case*. *Attorney-General v. Holland* (in *Aleyn, &c.*), was cited to shew the King shall have the benefit of a trust as well as a legal estate. That was not determined upon the merits; but *Aleyn* (p. 14), and also *Styles*, suppose a trust for an alien did go to the Crown; that the Crown takes by prerogative; at common law, if an alien purchased and took a conveyance, he took it for the benefit of the Crown by prerogative. After uses were invented, it was necessary to settle, where the use should go, purchased for the benefit of an alien. Therefore the statutes 3 *Rich.* 2, c. 5, and 7 *R.* 2, were made to enforce the common law prerogative, which else had been evaded by the introduction of uses. The ground of it was originally a common law right; and, if a trust had been created, the King would have been entitled to the trust, the same as to the land. But does it hold, therefore, that a trustee takes for the Crown on the death of *cestui que trust*? The difference between taking by prerogative and escheat is material, and Lord *Hale* makes the distinction." Besides this, he expressly decides the case on the ground that there was no trust existing (b). The same view is taken by the Lord Keeper, who says (c), "My objection to the information is, that it is for the execution of a trust that does not exist." In fact, the whole of that case proceeds upon the ground, that the Crown could only claim the equity vested in the person to whom the beneficial interest

(a) 1 *Eden*, 204.

(c) Page 250.

(b) Page 207.

terest in the estate was given, and that this equity had ceased in consequence of the death of that person without an heir; which is quite distinct from this case, where the Crown claims an equity through the living person to whom the beneficial interest in the estate is given.

1857.

BARROW  
v.  
WADKIN.

It is not, therefore, necessary in this case to dispute the authority of *Burgess v. Wheate* (a), which is quite distinct from it; but it may be fairly said, that the question there decided may possibly be considered as not finally concluded, if it should ever come again to be considered. In his judgment in that case, the *Master of the Rolls* says (b), that if the trustee came into Equity, he might be of opinion that he had no right. If this were so, and it seems to have been so decided by Lord *Loughborough* in *Williams v. Lord Lonsdale* (c), as there then would be no one having any right to the land, it would be difficult to hold that the Crown would not be entitled to take it as a vacant possession. The argument principally relied upon in that case, that the land must escheat either on the failure of the heirs of the trustee or of the *cestui que trust*, for that otherwise Courts of Equity would deprive a lord of his escheat, is not answered by either the *Master of the Rolls* or the *Lord Keeper*.

In *Middleton v. Spicer* (d), Lord *Thurlow* said, he did not see how the case before him was to be distinguished from *Burgess v. Wheate*, and yet he decided in favour of the Crown, and he was followed by Vice-Chancellor *Shadwell* in the case I have already referred to. In *Barclay v. Russell* (e) the same principle was adopted, and stock standing in the name of trustees, where the

*cestui*

(a) 1 *Eden*, 177.

(b) Page 212.

(c) 3 *Ves.* 752.

(d) 1 *Bro. C. C.* 201.

(e) 3 *Ves.* 424.

1857.

BARROW

v.

WADKIN.

*cestui que trust* had ceased to exist, was held to belong to the Crown and not to the trustees. In *Thrupton v. The Attorney-General* (a), a man seised in fee limited a term of years in trustees, in trust for such uses as he should by deed or will appoint, he died without making any appointment and without heirs: it was held, that the Crown took the term as well as the reversion in fee. In *Viscount Downe v. Morris* (b), the Vice-Chancellor *Wigram* held, that where the tenant of a copyhold in fee dies without heirs, and where there was a term existing in an unsatisfied mortgagee, the lord to whom the reversion in fee escheated was entitled to redeem the mortgagee and obtain an assignment of the term. I refer to these cases, not for the purpose of disputing the authority of *Burgess v. Wheate*, which, as I have already stated, is wholly distinct from the case before me, but for the purpose of shewing to what limits that case must be confined, and for the purpose of pointing out instances where the Crown has obtained the benefit of a trust which could not have been enforced by any existing *cestui que trust*. It is true that they were trusts of personalty, but I am unable to comprehend, on the question I am now considering, the right of the Crown to enforce the execution of a trust, what distinction there can be between a trust of land, as in the present case, and the trusts of a chattel real, as in the case of *Thrupton v. Attorney-General*, and the trust of stock, as in *Barclay v. Russell*, and the trust of money and personal chattels, as in *Middleton v. Spicer*.

Against this, which I must consider as a great array of authority, nothing has been suggested to me, nor have I myself discovered anything, with the exception of the *dictum* of the Vice-Chancellor of *England* in *Burney v. Macdonald* (c), and the case of *Rittson v.*

*Stordy*,

(a) 1 *Vern.* 340.(b) 3 *Hare*, 394.(c) 15 *Sim.* 6.

*Stordy* (a), before Vice-Chancellor *Stuart*. The *dictum* in *Burney v. Macdonald* was not necessary for the decision of that case, and, as I have already so fully commented upon it, in what I have already said, I think it unnecessary to add anything further upon it.

1857.

BARROW  
v.  
WADKIN.

With respect to the case of *Rittson v. Stordy*, before the Vice-Chancellor *Stuart*, it certainly nominally decides this point, but notwithstanding the respect I feel for the learning and attentive consideration of the Vice-Chancellor, I am not satisfied with the reasoning on which he founds this part of his judgment; and when I consider that the decision was clearly right on other grounds, and did not require the decision of this point, which has received no affirmance on appeal before the *Lords Justices*, I have thought myself bound to consider the case apart from that decision, and to form my own views of the question on principle and previous authorities, and which, I regret to say, is not in accordance with that expressed by the Vice-Chancellor.

There are still two other cases, which I think I must refer to, viz., *Fourdrin v. Gowdey* (b), by Sir *John Leach*, and *Du Hourmelin v. Sheldon* (c), before Lord *Langdale*, in which *Fourdrin v. Gowdey* is overruled. The point before me did not arise in those cases, but they are so far material for the present purpose, that they both seem to assume that the execution of a trust in favour of the Crown might be enforced. The latter case also is important in another point of view, for it lays down, not merely that aliens are entitled to the produce of the sale of the real estate devised to be sold, with a direction that the produce shall be applied for

(a) 3 *Smale & Giffard*, 230.(b) 3 *M. & K.* 383.(c) 1 *Beav.* 79, and 4 *Myl. & C.* 525.

1857.

BARROW  
v.  
WADKIN.

for their benefit, but, as a necessary inference, it decides that aliens could, in equity, compel the execution of that trust and the sale of the land for their benefit; whereas, if the passage in *Gilbert* is correct, they could not compel the trustees to execute the trust for sale, which would be a trust relating to real estate for their benefit. I employ the word "trust" instead of "use," because, unless for this purpose the words have the same effect, the passage relied upon from *Gilbert* does not touch the point before me.

I have thought it desirable to go through this detail, in order that the Bar, and if this case should be carried further, the Court of Appeal, might fully understand the grounds upon which I have come to the conclusion that, both on principle and upon authority, a devise of real estate to trustees, in trust for an alien, is a trust of which the Crown may enforce the execution, and obtain the benefit.

I have thought it unnecessary to encumber the case with any discussion as to whether there should be an inquisition and office found of these lands before the Crown could enter. This, which is discussed in several cases, is wholly beside the point before me, and I have also thought it better not to dwell on the argument relating to the policy of the law, which is the foundation of the rule prohibiting aliens to hold lands in this country, which is much noticed and relied on in earlier cases. So far, however, as this has any application, it supports the principle of the view I have taken.

The conclusion, therefore, to which I have come is, that the Crown is entitled to the lands, so far as they are devised in trust for *Eliza Barrow* and her children, who are aliens, and I will make a declaration to that effect.

effect. I think that the costs of all parties ought to come out of the testator's estate generally.

1857.

BARROW  
v.  
WADKIN.

NOTE.—The question as to the necessity of the grandchildren taking the Sacrament was mentioned again on the 22nd of July, 1857. The Court took time to consider, but ultimately, on the 28th of July, 1857, decided this point against the Crown.

BRIDGES v. LONGMAN.

June 3, 4.

THIS was a suit by a vendor against a purchaser for the specific performance of a contract, entered into in *December*, 1855, for the purchase of some leasehold premises in *Pall Mall*.

A power to raise money by sale or mortgage, held to authorize a mortgage with a power of sale.

On the 26th of *June*, 1856, the usual reference was made in the suit as to title and when shewn. The Chief Clerk, on the 25th of *February*, 1857, certified, that a good title could be shewn, and that it was first shewn on the 6th of *February*, 1857.

In a Crown lease, the lessee covenanted not to convert the premises into a shop or place of sale of any kind, without consent of the Commissioners of Woods and Forests. The trade of an engraver had been carried on in it, without consent or objection, but rent had afterwards been received.

There were cross summonses to vary the certificate; the Plaintiff insisting that a good title had been shewn prior to the filing of the bill, and the Defendant contending that a good title had not been shewn.

Several points arose, which it will be convenient to keep separate. The first arose under these circumstances :—

John Held, that the forfeiture had

been waived, and that the title was good.

The Defendant, a purchaser, ordered to pay all the costs, though a good title was not shewn until after the institution of the suit, by the production of a declaration which was not the cause of dispute, and had not been previously required.

1857.  
BRIDGES  
v.  
LONGMAN.

*John Buckmaster*, the owner of the leasehold property in question, by indenture of the 20th of *January*, 1837, assigned it to *William Buckmaster* and *Thomas Buckmaster*, upon trust to pay the rent, to keep down the interest on certain mortgages on the property, and apply the surplus income in payment of an annuity to *John Buckmaster*, and for the benefit of certain members of his family.

This settlement contained a power for the trustees and the survivor, &c., “*by sale or mortgage*” of all or any part of the lands, “or by both, or either, or any of these ways and means, from time to time, and as often, &c., to levy and raise such sums of money as would be sufficient, or they should think proper, for paying and satisfying all the said several mortgage, judgment and other debts,” and for raising the annuity to which *John Buckmaster* was entitled under the preceding trust, and for payment of costs, charges and expenses.

By an indenture of the 3rd of *October*, 1840, the trustees assigned the leaseholds to the Plaintiff by way of mortgage, with power of sale.

The Plaintiff, under his power, sold the leasehold property to the Defendant as before stated. The Defendant resisted the performance of the contract, on the ground, amongst others, that the trustees were not authorized to insert the power of sale in the mortgage, and that therefore the vendor had no title to sell the property.

Mr. *C. Hall* for the Plaintiff.

Mr. *Lloyd* and Mr. *Schomberg* for the Defendant.

*Russell*

*Russell v. Plaice* (a) and *Clarke v. The Royal Panopticon* (b) were cited : see also *Selby v. Cooling* (c).

1857.  
BRIDGES  
v.  
LONGMAN.

*The MASTER of the ROLLS.* I think that no objection can be taken before me that the power of mortgaging was executed by means of a mortgage, which contained a power of sale, because I think that such a power is incident to the power to mortgage, unless expressly excluded.

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Another question was raised in this case under the following circumstances :—

By indenture dated the 3rd of *June*, 1818, and made between the Commissioners of Woods and Forests of the first part, his late Majesty of the second part, and the lessee of the third part, the premises No. 7 in *Pall Mall* were demised to the lessee for ninety-nine years, and there was a covenant on the part of the lessee not to carry on, on the premises, any noisome trade without the consent, &c. of the said Commissioners, nor, without consent, to convert the said dwelling-house, &c. into a shop or place of sale of any kind. The lease contained a proviso of re-entry in case of non-performance of the covenants on the part of the lessee.

For twenty years the business of engraver had been openly carried on upon the premises.

The Defendant objected to the title, on the ground that there had been a forfeiture, and that the Crown's receipt of rent would not be a waiver of it.

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(a) 18 *Beav.* 21. (b) 2 *Drew.* 26.  
(c) 23 *Beav.* 418.



1857.  
BRIDGES  
v.  
LONGMAN.

The Commissioners of Woods and Forests, on an application to them, stated, that if the premises had been theretofore occupied for trade purposes without consent, they had no power, under the 15 & 16 *Vict.* c. 62, s. 2, to release the Crown lessee from the breach of covenant in that case committed; but as regarded the future occupation of the premises, they had no objection to their being used as at present.

The question argued was, whether the Crown would be able to evict.

Mr. *C. Hall*, for the vendor, contended that the Crown, by the subsequent receipt of the rent, had waived all past breaches.

Mr. *Lloyd* and Mr. *Schomberg*, *contrà*, argued that the Crown and Commissioners could not waive the forfeiture under the 15 & 16 *Vict.* c. 62, s. 2.

See *Croft v. Lumley* (a).

*The MASTER of the ROLLS* reserved judgment.

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June 4. *The MASTER of the ROLLS.*

I think there is nothing in the objection in reference to the forfeiture, and that the Crown could not now claim anything in respect of the forfeiture which occurred five years ago, having ever since received the rent, and that it would be a defence both at law and in equity.

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(a) 5 *Ellis & B.* 648, and the cases there cited.

The next question was as to the costs of suit. The Plaintiff insisted that a good title had been shewn prior to filing the bill, while the Defendant contended, that the Plaintiff must, according to the general rule, pay the costs up to the time when a good title had been shewn, which he said was on the 6th of *February*, 1857.

1857.  
  
 BRIDGES  
 v.  
 LONGMAN.

As to this, it appeared that an underlease of the property had been granted for twenty-one years, from the 25th of *December*, 1839, determinable, by notice, at the end of seven or fourteen years. Before suit, the vendor stated, that the lease had been surrendered, and he offered to hand it over to the purchaser. On the 6th of *February*, 1857, a solemn declaration of a Mr. *M'Kean*, made two days before, was brought into Chambers, shewing that notice had been duly given to determine the underlease at the end of fourteen years, and that it had been determined accordingly on the 25th of *December*, 1852, and the underlease given up. The Chief Clerk had held, that a good title was first shewn upon production of this declaration.

*The MASTER of the ROLLS* reserved the point.

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*The MASTER of the ROLLS.*

*June 6.*

In this case I have come to the conclusion that the Chief Clerk was right, and that the title was not sufficiently shewn until it had been shewn that the underlease was no longer a subsisting incumbrance; this was not done until the 6th of *February*, 1857.

This, however, was not the real contest between the parties.

1857.  
BRIDGES  
v.  
LONGMAN.

parties. If this had been the only question, the evidence would have been produced and the objection removed before the filing of the bill. The objections raised prior to the filing of the bill were really those on which I have expressed my opinion, and with respect to this underlease, its surrender could and would have been shewn at any time, if the requisition had been made. I am of opinion it cannot affect the costs. It is a question of some nicety, but I think it was not shewn that the underlease was not in existence until the time when the affidavit was produced. The result therefore is, upon the whole, that there must be a decree for specific performance, and for the execution of the assignment of the lease, according to the terms agreed upon between the parties, to be settled by me if the parties differ, and the Defendant must pay the costs of the suit.

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NOTE.—See *Scoones v. Morrell*, 1 *Beav.* 251.

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1857.

BETWEEN

RICHARD MORELAND, JOHN CURTIS,  
HENRY HANKS, THOMAS BROAD-  
WOOD and JOHN THOMAS NEATE,  
Plaintiffs,

AND

The Reverend JOSEPH WILBERFORCE  
RICHARDSON (since dismissed), WIL-  
LIAM HARMER (since dismissed),  
JOHN HARMER (since dismissed), BEN-  
JAMIN LAIMBEER, WILLIAM  
HONE and SAMUEL DUNN . . Defendants. *May 28, 29.*  
*June 5.*

THIS cause now (*a*) came before the Court, upon a motion for a decree, but the circumstances of the case had become varied since the application for an injunction by the amendments and evidence. It is therefore necessary to re-state the leading facts of the case, which were as follows :—

In 1757, the Rev. *George Whitfield*, being desirous of establishing chapels, with suitable burial grounds adjoining, obtained leases of a piece of ground in *Tottenham*

(*a*) See 22 *Beav.* 596.

adjoining were mortgaged. The mortgagors remained in possession, and afterwards, in 1833, graves were sold in perpetuity to different persons, without the concurrence of the mortgagees. The burial ground was closed by an order of the Queen in Council, and the mortgagees thereupon began to level the ground and deface and destroy the tombstones, &c. The Court held, that the mortgagees were bound by the rights granted, and restrained them from doing any act which would prevent the future interment in the family graves, with the permission of the Secretary of State, and from removing or injuring the graves or the tombstones, and ordered the mortgagees to replace those which had been removed.

The mortgagee of a burial ground has notice of the purposes to which it is devoted, and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor, while left in possession.

In 1831, a chapel and a burial ground

1857.  
  
 MORELAND  
 v.  
 RICHARDSON.

*tenham Court* Road, whereon he erected a chapel, partly by subscription and partly out of his own moneys ; the remainder of the ground was devoted to the purposes of burial of the dead, and the burial ground was in part appropriated to private family graves and vaults.

Sometime in *September*, 1828, the last lease, under which the chapel and premises were held, expired by effluxion of time, and the chapel was then, for about three years, closed.

The trustees of the chapel afterwards entered into a contract to purchase the ground on which the chapel was built, and the burial ground adjoining thereto (which was copyhold of inheritance), for 14,000*l.* On the 14th of *April*, 1831, the purchase was completed, and the chapel, burial ground and premises were duly surrendered to and vested in the fourteen trustees or managers of the chapel, and they were admitted thereto.

At the same court, the whole property was surrendered to *George Tudor* by way of mortgage, and subject to redemption on payment of 4,000*l.* Subsequently, in *June*, 1832, he obtained a further charge for 1,500*l.*

On the 30th of *June*, 1831, an advertisement was published in the "*Times*" newspaper stating as follows :—

" *Tottenham Court* Chapel and Burial Ground.

"The above premises being now purchased, in perpetuity, and placed in the hands of trustees, those persons who held family graves under the late lease and wish to purchase them, are requested to apply to Mr. *Nodes* [the clerk and sexton], who will give them every necessary information."

The

The five Plaintiffs, respectively, and several other persons thereupon purchased graves in perpetuity, which they protected by headstones and footstones, or by brick work covered in with large stone slabs or by tombstones or monuments.

1857.  
  
 MORELAND  
 v.  
 RICHARDSON.

No grants appeared ever to have been executed of this right of burial, but the contracts were evidenced by receipts given to the purchaser, the earliest of which was dated in 1833. It was in the following form :—

“ Feb. 4, 1833.

“ Received of Messrs. *John Curtis* and *Henry Hanks* 10*l.* 10*s.* for a family grave in the burial ground of *Tottenham Court Chapel*, which grave is now sold in perpetuity, and is situated in the ground on the south side of the chapel near the entrance gate.

“ For the trustees,

“ *Oliver Nodes*,

“ 10*l.* 10*s.*

“ Clerk and Sexton.”

On the 10th of *April*, 1856, *Tudor's* mortgage debt was, in consideration of 3,000*l.*, transferred to the Defendants *Benjamin Laimbeer*, *William Hone* and *Samuel Dunn*, and on the same day, the property was surrendered to them, and they were duly admitted tenants, subject to the existing right of redemption.

There was some contest as to how the 3,000*l.* had been raised, but it was admitted that 400*l.* had been raised from the public and 1,400*l.* from the congregation, and 380*l.* had been furnished by the Defendant *Laimbeer*. The rest (820*l.*) had been borrowed, by the Defendants *Laimbeer*, *Hone* and *Dunn*, of three of the members of the congregation, as they said, on their own personal security, but no security had been given for it.

1857. The burial ground having become filled, was closed for the purposes of burials, by an order of the Queen in council pursuant to the provisions of the 15 & 16 *Vict.* c. 85; 16 & 17 *Vict.* c. 134, and 18 & 19 *Vict.* c. 128.

*MORELAND*  
v.  
*RICHARDSON.*

In *May*, 1856, Messrs. *Harmer*, builders, by the direction of the Defendants *Laimbeer*, *Hone* and *Dunn*, commenced levelling the ground of the churchyard. In doing so, they pulled down and removed the tombs, tombstones, &c. of the private family graves or vaults purchased by the Plaintiffs and others, and they employed the stones in paving the court yard surrounding the chapel, and for that purpose they cut and defaced them. It was also admitted, that the three Defendants, *Laimbeer*, *Hone* and *Dunn*, were about to devote the burial ground to some other purpose.

Under these circumstances, the five Plaintiffs filed the present bill, against Mr. *Richardson* (the minister of the chapel), the Messrs. *Harmer* (the builders), and against *Laimbeer*, *Hone* and *Dunn*, praying an injunction in the following terms, viz.:—to restrain the Defendants, &c. “from removing, destroying, defacing, cutting, breaking or otherwise injuring or intermeddling with the private or family graves or vaults of or belonging to the Plaintiffs, or of or belonging to such other persons as shall contribute to the expense of this suit, and being in the burial ground adjoining to the chapel in *Tottenham Court Road* aforesaid, or the tombstones, inscription-stones, monuments, headstones, footstones or fences now or lately upon or around the private or family graves or vaults respectively, and from destroying, obliterating or defacing the inscriptions thereon, and from using or applying the tombstones, inscription-stones, monuments, headstones, footstones or fences to any other purpose or on any other spot or place than as they were

were used or applied, upon or over the private or family graves or vaults to which the same respectively belong, and from continuing to use or apply the same as and for pavement-stones or for any other purpose whatever than as covering, or protections, or records of the graves or vaults, and from letting, using or applying the said burial ground for building purposes, or any other purposes of profit, or otherwise than to protect and keep the same as a burial ground, subject to the provisions of the Acts of Parliament."

1857.  
MORELAND  
v.  
RICHARDSON.

In *July*, 1856, upon a motion being made for an injunction, the Court granted one (a), restraining the trustees from removing or injuring the graves or grave-stones, &c., but limited that relief to the spots purchased by the Plaintiffs, so that the rights of the three Defendants to the remainder were unaffected by the injunction.

On the evening of the day on which the injunction had been granted, the three Defendants employed twenty or thirty men to level the earth in the burial ground. They began at 11 o'clock p.m., and working all night, levelled the ground, leaving only the two or three tombstones which the injunction prevented them interfering with. In consequence of the effluvium, the Board of Health interfered on the following day.

The Plaintiffs, acting on the suggestion of the Court, afterwards dismissed the bill as against *Richardson* with costs, and as against the *Harmers* without costs.

The three Defendants put in their answer. It appeared that they were members of the congregation and  
that

(a) 22 *Beav.* 596.



1857.  
  
 MORELAND  
 v.  
 RICHARDSON.

that *Hone* and *Laimbeer* were deacons, but neither of them was either manager or trustee of the chapel. They admitted that it was their present purpose to appropriate the burial ground as a vacant piece of ground, and to apply the same to some purpose of profit, which would not interfere with the bodies in the burial ground, as soon as they had the opportunity of so doing, and one of the three Defendants, in his cross-examination, stated, that it was their intention to convert it to some such purpose as a timber yard.

They also insisted on the several grounds of defence stated in the argument.

The only evidence to prove the knowledge of *Tudor*, the mortgagee, of the grants of burial which had been made, was an affidavit of *Nodes*, in these terms:—

I say, “that the family graves and vaults of the Plaintiffs were, to the best of my belief, sold and purchased with the privity and knowledge of *George Tudor*. *George Tudor* is the owner of several houses in the immediate neighbourhood of the burial ground, and I say that I have several times subsequent to the 14th day of *April*, 1831, and between the years 1831 and 1840, seen *George Tudor* close to the burial ground, and I say that the said *George Tudor* must have known that interments and burials were constantly being made in the ground. The ground was used and appropriated as a burial ground for many years prior to the 14th day of *April*, 1831, and on the 14th day of *April*, 1831, the ground was a burial ground, with graves, monuments, tombs and tombstones thereon, and so continued until in or about the beginning of the month of *May* last.”

The cause now came on upon a motion for a decree, when it was asked to make the injunction perpetual.

Mr.

Mr. *R. Palmer* and Mr. *Greene* for the Plaintiffs.

1857.

The three trustees are in possession not as mortgagees, but as trustees for the congregation. Two of them are deacons, and the management of the property is left in their hands.

*MORELAND*  
v.  
*RICHARDSON.*

*Tudor* had notice of the purposes to which the ground was devoted ; he attended the chapel and lived close to it, and knew that the land was used as a burial ground, and it is so described in his deed. Having that notice, and not interfering, he cannot question the rights acquired in the ordinary course of management of the mortgaged property. The *Queen v. Sharpe* (a) shews that an improper interference with an unconsecrated burial ground is a misdemeanor at common law.

The MASTER of the ROLLS stopped the Counsel of the Plaintiffs, and called on the Defendants.

Mr. *Follett* and Mr. *W. R. Ellis* for the three Defendants.

There is no valid charitable trust affecting the land, for the deed has not been enrolled as required by the provisions of the Statute of Mortmain, 9 *Geo. 2*, c. 36. The deed is legally invalid, and the trusts could not be enforced against the trustees in this Court ; the words of the statute are too strong ; *Attorney-General v. Ackland* (b) ; *Attorney-General v. Gardner* (c) ; *Attorney-General v. Munro* (d). Whatever moral obligation may exist, there is no legal obligation, trust or equity for the benefit of the congregation. It is alleged that the three Defendants are trustees of the mortgage, but,

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(a) 26 *L. J. (N. S.) Magist.*  
*Cas.* 47.

(b) 1 *Russ. & My.* 243.

(c) 2 *De G. & Sm.* 102.  
(d) *Ibid.* 122.

1857. for the same reasons, the mortgage formed no part of  
 the property of the congregation, and as regards the  
 money subscribed, that also was affected by no trust ;  
 MORELAND  
 v.  
 RICHARDSON. *Gridlestone v. Creed (a).*

The three Defendants are acting in their character of mortgagees of the property, and all the rights claimed by the Plaintiffs were acquired after the mortgage, every prior right having ceased when the leases expired. The Plaintiffs therefore take, subject to the rights of the mortgagees. The mortgagors were mere tenants at will to the mortgagee, and can grant no higher interest.

The alleged grants do not affect the mortgagees' rights, for parties claiming under a mortgagor, by acts subsequent to the mortgage, are mere tenants by sufferance to the mortgagee, and notice to them to quit is unnecessary ; *Thunder d. Weaver v. Belcher (b)*. Again, the possession of the mortgagor, and those claiming under him, is not adverse to the mortgagee, and no title was acquired by them by twenty years' possession. *Doe d. Higginbotham v. Barton (c)*. The alleged sales were made without the sanction, privity or consent of *Tudor*, the mortgagee, and therefore he was in no way bound by them. There is no allegation that *Tudor* had notice of these alleged contracts, nor is there any proof, except a vague belief, supported by no sufficient facts. At the date of the advertisements, all right of burial had ceased, and no right of perpetual burial had ever been previously granted, so as to create a usage. Whatever notice the three Defendants personally had is irrelevant to the question, for they now claim under *Tudor*, and are entitled to all his rights, and to rely on his

(a) 10 *Hare*, 480.

(b) 3 *East*, 449.

(c) 11 *Adol. & El.* 307.

his want of notice. But even if *Tudor* had notice, his mere non-interference could give the Plaintiffs no rights as against him. *Nodes* had no authority to sign the receipts (a), and under the Statute of Frauds, 29 *Car.* 2, c. 3, an easement in land can only be granted by deed. Is this Court prepared, in this state of circumstances, to make a decree for specific performance as against these Defendants?

1857.  
  
 MORELAND  
 v.  
 RICHARDSON.

The right to inter in this ground is forbidden for the future by the "Intramural Burial Act" (15 & 16 *Vict.* c. 85), the mortgagees' rights have been taken away without compensation; and, not disturbing the dead, they are justified in making the ground profitable and available for the purpose of realizing their security.

*The MASTER of the ROLLS* reserved judgment.

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*The MASTER of the ROLLS.*

June 5.

After reading the evidence in this cause, I come to the same conclusion that I did on the hearing of the motion for the injunction.

The Plaintiffs respectively claim, as purchasers for value, a right of burial in a particular spot, which is described and designated, and they have all, except one, for upwards of twenty years, from the time when they purchased this right down to the present year, been in possession and enjoyment (so far as that expression

(a) The receipts were not duly stamped. Upon this *Evans v. Prothero*, 1 *De Gex, M. & G.* 572, was cited to shew that the receipts might still be received in evidence to prove the contract, but it was then proposed that they should be stamped.

1857.  
MORELAND  
v.  
RICHARDSON.

pression is properly applicable to ground devoted to burial), without any attempt having been made, during that time, to dispossess or to disturb them in that right. So that, with the single exception of one of them, this right has been exercised by the Plaintiffs for a period of more than twenty years.

If they possessed this right, the question is, how have they been deprived of it? What have they done, or what power has any other person to deprive them of this particular right? In the first place, it is said, that an Act of Parliament has passed (a) which has altogether put an end to the right of burial in this spot, and which has deprived the Plaintiffs of their right of burial there; but upon turning to the Act we find, that though the general right of burial is put an end to by it, yet that in the sixth clause there is a special reservation of the rights of particular individuals to bury in the ground, provided they previously obtain the sanction of the Secretary of State for that purpose. The legislature has, therefore, by this section preserved to the Plaintiffs their right, subject to their previously obtaining the sanction of the Secretary of State, and therefore it is not taken away by Act of Parliament. The Defendants contest that right, and seek to disturb the Plaintiffs in that species of possession of which a burial ground is susceptible. It is to be observed, that it is not the Plaintiffs who seek to obtain possession of the property held by the Defendants, but it is the Defendants who have taken forcible possession of the property of the Plaintiffs, and which they have enjoyed from the time I have mentioned. What course would this Court take where it found that there had been undisputed possession for upwards of twenty years?

(a) 15 & 16 Vict. c. 85.

years? It would say, "establish your right at law, if you can do it, but we will not allow you to take forcible possession where there has been even a slight adverse possession during the whole of the period."

1857.

MORELAND  
v.  
RICHARDSON.

The next question to be considered is, what is the title of the Defendants? They say that they are in the situation of Mr. *Tudor*, the mortgagee, under an assignment from him; that their sole right is that of a mortgagee upon the property; that Mr. *Tudor's* mortgage was prior in date to the sale to the Plaintiffs, and that, consequently, he was not bound by any of the subsequent acts of other persons, and that they, the Plaintiffs, standing in his shoes, having exactly the same rights and the legal estate, are not bound by these acts. If that were so established, and there was nothing more in the case, I should be of opinion that the Plaintiffs (even if they had not the right which I consider them to have) would be entitled to redeem the Defendants, upon payment of what was due to them. It is unnecessary to consider that, because in my view of the evidence, Mr. *Tudor* himself must be considered to be fixed and affected with a knowledge of the manner in which this property was to be dealt with, and with the subsequent dealings with the persons who have become interested. I also repeat, that if Mr. *Tudor* himself were here, I should require him to establish his title at law before I could allow him forcibly to dispossess persons who have been in possession of the property for the period of time I have mentioned. But Mr. *Tudor* took a mortgage of this property, which is described in the mortgage deed as a chapel and burial ground; he knew perfectly well, when he took his mortgage, what the nature and object of the building and ground were, and the purposes to which they were devoted. There is some evidence of his personal knowledge, but I do  
not

1857.

  
MORELAND  
v.  
RICHARDSON.

not think it at all necessary to refer to it, for the description in the deed is quite sufficient to shew, that he took his mortgage as a mortgage of a burial ground. What, then, is the object of a burial ground attached to a chapel? Is it not to grant to persons rights of burial therein, both temporary and permanent, and was he not aware, when he took his mortgage, that this was the mode in which the property was to be dealt with? If he afterwards allowed his mortgagors to continue to hold the ground for that purpose, without taking possession himself, is he not bound by all the acts which they subsequently did, in accordance with all the usual course and conduct of trustees of a burial ground, and by which they granted rights of burial, both temporary and permanent? In my opinion he is bound, and cannot afterwards say, "I had no notion that permanent rights of burial were to be granted in this burial ground; and I now choose to turn it to a totally different purpose, disregarding the rights of burial acquired in it." The deed itself was notice to him that this property was to be devoted to this particular purpose, and was to be made profitable in the only mode in which a burial ground could be made profitable. If a person took a mortgage of a cemetery ground in the neighbourhood of London, could he afterwards say, that all the burials subsequent to his mortgage had taken place without his knowledge, that he was not bound thereby, and that he was entitled to disturb the graves, and turn the ground to any other purpose he pleased? I apprehend that this would be totally contrary to that which he must be considered to have had distinct knowledge of, at the time he advanced his money upon that particular species of security, the exact nature and character of which he perfectly well knew.

That being the case, I am of opinion that it is not  
necessary

necessary for me to go into the various other points which have been raised with respect to trusteeship and the like. I consider that the evidence before me shews, that Mr. *Tudor* had full knowledge of the object and purposes to which this ground was devoted, that for a considerable number of years he acquiesced in what was done, and that the Defendants also have always acquiesced in it since they obtained a transfer of his mortgage, with this single exception, that, when the Metropolitan Burial Act passed, preventing the ordinary burials taking place, they considered the whole right was put an end to and taken away, and that they might do just as they pleased with the land. I am of opinion that the Plaintiffs are entitled to a perpetual injunction.

1857.  
  
 MORELAND  
 v.  
 RICHARDSON.

With respect to the costs, the opinion I have formed is this:—The Plaintiffs claimed more than they were entitled to. They claimed a general right that the burial ground should not be touched at all, and in respect of the rights of other persons with respect to whose interest they had nothing to do. I am of opinion that the Defendants also claimed more than they were entitled to. Therefore, up to and including the hearing of the motion for the injunction, I think there ought to be no costs on either side; and I am also of opinion that, since the motion, this contest has been occasioned by the Defendants, and that they must pay the costs of the suit from that period down to the present time.

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After some discussion as to the form, the injunction, as ultimately settled, was as follows:—

“Decree, that a perpetual injunction be awarded against the Defendants *Benjamin Laimbeer, William Hone, and Samuel Dunn*, to restrain them, their servants,



1857.

  
MORELAND  
v.

RICHARDSON.

vants, &c., from doing any act, whereby the interment of any corpse in the private or family graves or vaults respectively belonging to the Plaintiffs, in the burial ground of *Tottenham Court Chapel*, may be prevented or interfered with, in case the Secretary of State for the Home Department, for the time being, should hereafter permit such right of interment therein to be exercised by the Plaintiffs or any one of them, or by any person claiming through them or any one of them respectively, and from removing, destroying, defacing, cutting, breaking or otherwise injuring or interfering with the said graves or vaults, or any of them, or with the tombstones or gravestones now over or upon the private or family graves or vaults of or belonging to the Plaintiffs, or any or either of them, in the burying ground of the said chapel, or with the tombstones or gravestones to be restored and placed over such family graves or vaults as hereinafter directed. And it is ordered, that the said Defendants do, on or before the 10th day of *August* next, restore and place upon or over the said graves or vaults of the Plaintiffs *Richard Moreland, John Curtis, Henry Hanks and John Thomas Neate*, in the burying ground of the said chapel, the tombstones and gravestones, with inscriptions, which have been removed by the Defendants from the said graves or vaults."

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1857.

JONES v. WILLIAMS.

April 27, 28.

May 30.

THE facts of the case were as follows:—*Benjamin Rollason* (the father of the bankrupts), in *December*, 1840, bought a rectangular piece of ground, being 86 yards and 2 feet long, and 24 yards broad, and this was conveyed to him in fee simple by indentures of the 3rd and 4th of *December*, 1840. In *August*, 1843, he bought an adjoining rectangular piece of land, adjoining the piece first bought, being exactly the same length, but only half the breadth, *viz.*, 12 yards. The two pieces formed one plot of ground, 86 yards 2 feet long, and 36 yards broad, which was used by *Benjamin Rollason* as a cement and wire manufactory; he erected various works thereon for this purpose, and used the whole as one piece of land, for which the proximity of a canal, which bounded the land on the east, afforded peculiar advantages. In *September*, 1844, he made his will,


Adjoining premises (*X.* and *Y.*) were respectively conveyed to a testator by deeds of 1840 and 1843 and then united. He devised them to his sons, who made an equitable mortgage by deposit of the deeds of *Y.* and the probate of the will. The mortgagee believed, from the sons' statement, that the whole property was comprised. Held, that the pro-

perty *X.* was not comprised in the equitable mortgage.

A mortgagee, who is informed that there are "charges" affecting the property, and is cognizant of two only, cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others.

The rule with respect to the consequence of a purchaser abstaining from making inquiries, does not depend exclusively on a fraudulent motive for such abstinence. When the circumstances of a case put a purchaser on inquiry, a false answer or a reasonable answer given to any inquiry, may dispense with the necessity of further inquiry; but where no inquiry has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry.

A real estate belonged to three partners; one retired and conveyed his share to the two others, "subject to all charges and mortgages affecting the same," and the two made an equitable mortgage to the defendants. There were three charges on the property, but the defendants knew of two only, and made no inquiry as to there being more. Held, that having notice of the terms of the conveyance to the surviving parties, the defendants were bound to inquire whether there were any other charges, and not having done so, that they could not, as against the third equitable charge, insist on being purchasers for valuable consideration without notice.

1857.  
  
 JONES  
 v.  
 WILLIAMS.

will, and by it he gave this property to his wife for her life, and after her decease to his daughter for 1,000 years, in trust to raise 650*l.* for her benefit, and subject thereto, he gave the property to his three sons, *John*, *David* and *Benjamin*, absolutely. He made his daughter and his two eldest 'sons executors. The father died in 1844, and in 1845 the two eldest sons, *John* and *David*, proved his will, and carried on business together on this piece of land, as co-partners in the wire and cement works.

The Plaintiffs were bankers at *Bilston*. In 1847, the two sons, *John* and *David*, caused their account with the Plaintiffs to be transferred into the joint account of themselves and the widow, and they deposited with the Plaintiffs the indentures of the 3rd and 4th of *December*, 1840, conveying "the two-thirds" as a security for any advance made to them on their banking account, or on any bills of exchange. This continued until 1854, in which year, their mother, *Deborah Rollason*, died, and afterwards, in the same year, the youngest brother, *Benjamin*, having attained twenty-one, was taken into partnership. Thereupon, a further memorandum of deposit, signed by the three brothers, was given to the Plaintiffs, which was as follows:—

" Memorandum of deposit of deeds to secure 1,000*l.* and floating balance of banking account.

" Whereas on or about the 3rd of *February*, 1847, *Deborah Rollason*, with her sons, *John* and *David Rollason*, deposited in the hands of *William Jones* and sons, bankers of *Bilston*, certain deeds, indorsed as follows :

" 4th *December*, 1840. { Conveyance of a Messuage,  
*James Kyrke* and { Wharf, Land and Premises  
 another to *B. Rol-* { at *Bradley*, (with an Assign-  
*lason* and Trustee. { ment of a Term.)


Relating

Relating to their freehold lands and works called the *Bradley Wire and Cement Works*, to secure the balance of a banking account, carried on under the style or firm of "*B. Rollason and sons*;" and whereas the said *Deborah Rollason* has subsequently become deceased, and the undersigned *Benjamin Rollason* having become of age has been admitted into partnership with the said *John* and *David Rollason*, and they continue to carry on business under the style or firm of *B. Rollason and Sons*: Now, in consideration of advances from time to time in their banking account, the undersigned, jointly and severally, confirm the before-mentioned deposit of deeds, and hereby grant and continue to the said *William Jones* and Son their equitable security upon the said plot of land, works and machinery, called the *Bradley Wire and Cement Works*, for securing the repayment of the said advances of 1,000*l.*, or other sum which may become due to the said *William Jones* and Son, whether as balance of a banking account, on bills of exchange, or otherwise; and the undersigned hereby agree to execute to the said *William Jones* and Son a legal mortgage of their interest in the said land, buildings and machinery comprised in the before-mentioned *Bradley Wire and Cement Works*, if it, at any time, should be required. Dated 16th of *December*, 1854.

*John Rollason,*  
*David Rollason,*  
*Benjamin Rollason."*

1857.  
JONES  
v.  
WILLIAMS.

The brothers afterwards, by indenture of the 30th of *December*, 1854, became possessed of an adjoining piece of land ("the iron works"), of the same shape, the same length, and a little broader, immediately adjoining the cement and wire manufactory, and on which they carried on iron works. In *January*, 1855, they applied to the Plaintiffs for a further advance, which being

1857.  
  
 JONES  
 v.  
 WILLIAMS.

refused by them, they had recourse to the Defendants Messrs. *Williams*, bankers in *Wednesbury*, in the neighbourhood of *Bilston*, and requested them to make the advance, and offered as a security, for the sum of 3,000*l.*, which they required, to deposit the title deeds, both of the iron works and also of the cement and wire works. Messrs. *Williams* stated, that all the premises seemed united together, that they were used together by means of internal communication, and that the title deeds of the whole were offered to be deposited, and thereupon a parcel of deeds was deposited with them, which were, in fact, the deeds of *December*, 1854, conveying "the iron works," and also the deed of the 5th of *August*, 1843, conveying "the one-third" or smaller portion of the plot of ground, on which the cement and wire works stood. The deeds were sent to Mr. *Thursfield*, their solicitor, who prepared the memorandum of deposit, which was dated the 2nd of *February*, 1855, and was to this effect:—It was a memorandum "that *John, David* and *Benjamin Rollason* have deposited with Messrs. *Phillip* and *Henry Williams* the several deeds and writings included in the schedule hereunder written, as a security to them, their executors, administrators and assigns, and any who may become their partner, for repayment of the sums of money which, at any time thereafter, shall, from time to time, be due to *John, David* and *Benjamin*, or any or either of them, to Messrs. *Williams*, or their firm, together with commission and other usual bankers' charges and expenses."

The schedule referred to was as follows:—

"Schedule.

✿ "5th *August*, 1843.—Statutory indenture of this date made between," &c. &c. [stating the parties], being a conveyance

conveyance to "*Benjamin Rollason* (now deceased) of a piece of land at *Bradley* aforesaid."

1857.

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JONES

v.

WILLIAMS.

"2nd *September*, 1844.—Probate copy will of the said *Benjamin Rollason*, deceased, of this date, proved," &c.

"30th *December*, 1854.—Indenture of this date, made between *James Kyrke* of the first part, *John Rollason*, *David Rollason*, and *Benjamin Rollason*, parties hereto, of the second part, and *John Whitehouse* of the third part, being a conveyance to the parties hereto of the second part, of another piece of land at *Bradley* aforesaid."

This memorandum was signed by the three *Rollasons* and witnessed by Mr. *Thursfield*.

The Court held, that this memorandum did not affect "the two-thirds" of the property which had been conveyed by the deeds of the 3rd and 4th *December*, 1840, although, from conversations with the three brothers, Messrs. *Williams* had been induced to believe it did.

The partnership between the three brothers was dissolved in *February*, 1855, when *John* retired; and, by an indenture of the 24th of *February*, 1855, he conveyed all the three properties and the machinery, &c., to hold the same, "subject nevertheless to all reservations of the mines and minerals and all mortgages and charges affecting the same," unto *David* and *Benjamin* in fee. *John* also assigned the partnership stock and assets to the continuing partners, and he covenanted that he had good title to convey, "subject and in manner aforesaid." *David* and *Benjamin*, on their part, covenanted

1857. to pay "all mortgage and other debts" due from the  
 JONES partnership, "whether the same are or are not charge-  
 v. able on the said hereditaments," and to indemnify *John*  
 WILLIAMS. against all personal liabilities.

The two brothers continued to carry on their trade, but got into difficulties, and Messrs. *Williams*, in *March*, 1855, brought an action against *David* and *Benjamin* for the balance due, upon which they signed the following memorandum :—


" *Wednesbury Oak*, 16th *March*, 1855.

" Messrs. *Philip* and *Henry Williams*.

" You having commenced an action against us for the balance of our overdrawn account at your bank, we hereby agree, in consideration of your staying proceedings, to execute and perfect to you a valid transfer and assignment of all our property at the wire works, *Pot-house Bridge*, by way of further security for the said balance, and also the balance due on *Rollason* and *Sister's* account, and also to place in your hands the transfer to us of our brother *John's* share in the *Coseley Works*, and to execute to you a valid legal mortgage of such works, the title deeds to which have been, sometime since, deposited with you."

On the 16th of *April*, 1855, *David* and *Benjamin* executed a mortgage to Messrs. *Williams*, and thereby, (after reciting the testator's will, the deed of 1854, and the deed of dissolution of 1855, the conveyance thereby by *John* to *David* and *Benjamin*, but omitting to state that it was subject to "all charges and mortgages affecting the same"), *David* and *Benjamin* conveyed to Messrs. *Williams* the two-thirds (stating the admeasurement), and also all other lands, hereditaments and appurtenances,

appurtenances, if any, thereto belonging or adjoining, and situate at *Bradley* aforesaid, belonging to *Benjamin Rollason*, deceased, and devised by his will, and all other the hereditaments devised by his will; and secondly, the iron works, by way of mortgage to secure 4,505*l.* and further advances. It did not appear that any inquiries had been made by Messrs. *Williams*, or their solicitor, as to the mortgages and charges affecting the property, except those stated by the *Master of the Rolls* in his judgment (*post*, p. 60). It also appeared that the mortgagors' solicitor having inserted in the power of sale enabling Messrs. *Williams* to sell the property mortgaged, (subject to or discharged from any existing charges thereon made by the will of the testator,) the words "or otherwise," Mr. *Thursfield* struck them out, writing in the margin "My clients have advanced their money on the faith that there are no other charges."

1857.  
  
 JONES  
 v.  
 WILLIAMS.

Thirteen days after this mortgage, the Defendants, for the first time, had direct notice of the Plaintiffs' mortgage, which had been concealed by the mortgagors. To secure themselves the Defendants, on the 13th of *June*, 1855, got the term of 1,000 years created by the will of the testator assigned to a trustee for them, and they thus obtained the legal estate in the properties devised by the will.

Under these circumstances, the question was, whether the Plaintiffs' equitable mortgage, which was prior in date, had priority over the Defendants, who had the legal estate, and claimed to be purchasers for valuable consideration without notice.

Mr. *Lloyd*, Mr. *Speed* and Mr. *Wood*, for the Plaintiffs,



1857.  
  
 JONES  
 v.  
 WILLIAMS.

tiffs, cited *Worthington v. Morgan* (a); *Allen v. Knight* (b); *Hewitt v. Loosemore* (c); The Mayor of *Berwick v. Murray* (d).

Mr. *R. Palmer*, Mr. *Amphlett* and Mr. *Nalder*, for Messrs. *Williams*, cited *Finch v. Shaw*; *Colyear v. Finch* (e); *Jones v. Smith* (f); *Martinez v. Cooper* (g); *Ware v. Lord Egmont* (h); *Kennedy v. Green* (i); *Elliot v. Merryman* (k); *In re Langmead's Trust* (l); *Attorney-General v. Stephens* (m); *Greenwood v. Churchill* (n).

*The MASTER of the ROLLS* reserved judgment.

May 30.

*The MASTER of the ROLLS.*

This is a suit by equitable incumbrancers on certain lands at *Bradley*, near *Wednesbury*, in the county of *Stafford*, seeking to enforce the payment of their charge against the Defendants. The first two Defendants are also mortgagees on this land, and the other two are the assignees of the mortgagors, who have become bankrupt. The question is one of priority of charge. The charge of the Plaintiffs is prior in point of date, but the Defendants allege, that they are, to the extent of their mortgage, purchasers for value without notice of the prior incumbrance, and that they have in them the legal

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|---------------------------------------------|-------------------------------------------|
| (a) 16 <i>Simons</i> , 547.                 | (h) 4 <i>De G., M. &amp; G.</i> 460.      |
| (b) 5 <i>Hare</i> , 272.                    | (i) 3 <i>Myl. &amp; K.</i> 699.           |
| (c) 9 <i>Hare</i> , 449.                    | (k) <i>Barnard</i> , 78; 1 <i>Tudor's</i> |
| (d) 3 <i>Jurist</i> , N. S. 1.              | <i>Lead. Cas.</i> 40 (1st edit.).         |
| (e) 19 <i>Beav.</i> 511; 5 <i>H. L.</i>     | (l) 20 <i>Beav.</i> 20.                   |
| <i>Cas.</i> 905.                            | (m) 6 <i>De G., M. &amp; G.</i> 111.      |
| (f) 1 <i>Hare</i> , 43; 1 <i>Phil.</i> 244. | (n) 6 <i>Beav.</i> 314.                   |
| (g) 2 <i>Russ.</i> 198.                     |                                           |

legal estate, and that, consequently, they are entitled to hold in priority to the Plaintiff's claim, until they are satisfied.

1857.

JONES

v.

WILLIAMS.

The first question is, over what land and on what property did the memorandum of equitable deposit to the Defendants of the 2nd of *February*, 1855, constitute an equitable mortgage? On this question, I am of opinion that it did not constitute any mortgage or equitable charge on the "two-thirds" of the land on which the cement and wire manufactory stood, and which two-thirds were conveyed by the deeds of the 3rd and 4th of *December*, 1840, which had been deposited with the Plaintiffs. I entertain no doubt, that the Messrs. *Williams* believed that the deed of *August*, 1843, conveyed the whole of this piece of land; and that if they were not so assured, in direct terms, they were induced to believe that this was so from the conversation between them and the three brothers. But assuming this to be so, still to treat it as an actual charge on the property not included in any of the deeds, would be giving a greater extent than would be possible to the doctrine of equitable deposits. The existing doctrine has often been said to set the Statute of Frauds at nought, but the extent to which this new doctrine, if it prevailed, must go, would be this:—That because certain deeds were deposited to secure advances, these deeds shall create a charge on land to which they do not relate, and in respect of which no deposit is made, by reason of the misrepresentation of the persons making the deposit, whereby the persons who advanced the money believed, that the deeds included other property than that which they actually did. If this were law, any deed might be deposited, with an allegation that it should be held as a deposit to charge any lands which were the property of depositors. In addition to which, it is to be observed, that

1857.  
~  
JONES  
v.  
WILLIAMS.

that the Defendants had always the means, if they thought fit, of verifying the description of the parcels contained in the deed, by causing an actual admeasurement to be made of the land in question. Here the description is by yards, in another case it might be by acres, but the difference is not material. I think that they are not to be prejudiced, by reason of not having caused such measurement to be made; but, on the other hand, I think they can derive no advantage from such omission.

I think it probable, on the evidence, that the Plaintiffs also, when they took the deeds of the 3rd and 4th of *December*, 1840, thought that they had the deeds of the whole of the wire and cement manufactory, but I cannot therefore say, that their charge extended to the one-third included in the deed of *August*, 1843. In like manner, I am of opinion, that upon the deposit in 1855 it is impossible to hold, that the Messrs. *Williams* took a charge or advanced their money upon the security of the piece of land comprised in the indentures of the 3rd and 4th of *December*, 1840.

This being so, it remains to consider the effect of the subsequent acts between the *Rollasons* and the Messrs. *Williams*. In *February*, 1855, the partnership between the brothers was dissolved; and on the 24th of that month, *John* conveyed all his interest in the property in question, including the whole of the iron, wire and cement manufactory, and also his interest in certain other works, called the *Coseley Works*, to his brothers, "subject" (in express words) "to all the mortgages and charges affecting the same," which they covenanted to pay. The two brothers got into difficulties, and on the 10th of *March*, 1855, the Messrs. *Williams* brought an action against them for the balance due on their bank-  
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ing account. As soon as the action was brought, the two brothers (*David* and *Benjamin*) signed a memorandum, undertaking to place in the hands of the Defendants the transfer of *John's* share in the *Coseley* works, and also all his share in the iron works, and the wire and cement works, and to execute a valid mortgage thereof to the Defendants Messrs. *Williams*. On the 24th of *March*, 1855, an abstract of the deeds was delivered to the solicitor of the Defendants, a mortgage was prepared accordingly, and this mortgage was executed on the 16th of *April*, 1855. This deed recites the deposit made in *February*, 1855, the dissolution of the partnership, the deed of 24th of *February*, 1855, and the debt due to the bank; it omits all mention of the deeds of the 3rd and 4th of *December*, 1840, or of the property therein comprised, but it contains general words, which are sufficient to cover all the property of the two brothers, including anything which was not comprised in the deeds deposited.

1857.  
  
 JONES  
 v.  
 WILLIAMS.

The question is as to the effect of this deed, and whether, under it, they, Messrs. *Williams*, can be treated as purchasers of the two-thirds of the cement and wire works comprised in the deeds of *December*, 1840, without notice of the Plaintiff's incumbrance. I think that they cannot. In the first place, they had distinct notice, by the deed of the 24th of *February*, 1855, which is recited in their mortgage, that the conveyance of *John's* share "is made to his brothers, expressly "*subject to all mortgages and charges affecting the same*," which they covenant to pay. I consider this to be a distinct notice to them that there were mortgages or charges (in the plural number) affecting the same. They knew of two, viz., the charge created by the will of the father and their own charge; is this knowledge sufficient to exonerate them from all further inquiry

1857.  
JONES  
v.  
WILLIAMS.

inquiry as to any charges affecting the same? I am of opinion that it is not; and that a person who advances money on the security of property, who is informed that there are "charges" affecting it, is not entitled to claim to be a purchaser without notice of these charges, because he believes that the two of which he is cognizant, and which might be sufficient to satisfy the words, are all the charges upon it. He is, in my opinion, bound to inquire whether these are all the charges affecting the property, and whether there are any others. The Defendants seek to enforce their right to include, under the general words, property not comprised in the particular description, and the deeds belonging to which were not in their possession or handed over to them. It is true that the Messrs. *Williams* believed that the particular description included the whole of the iron, wire, and cement works, and that they were led to believe this from the general words used by the *Rollasons*, that those were the deeds of their works; but this, as I have already observed, will not deprive the Plaintiffs of their rights, who were no parties to any misrepresentation. I do not, throughout the evidence, anywhere find, that this specific inquiry was made, viz., "Do the deeds deposited include every portion of your iron works, and of your wire and cement works at *Bradley*?" I do find a statement that the mortgage deed of 1855 would comprise the whole of this property, which is true, but which is a totally different matter; neither do I find anywhere a specific inquiry made to this effect, viz., "What are the mortgages and charges affecting the property, subject to which *John's* share in the property is conveyed to you?" The absence of such inquiries appears to me to be fatal to the claim of priority set up by the Messrs. *Williams*. I concur in the argument of the Plaintiffs' Counsel, that the rule, with respect to the consequence of abstaining from

from making inquiries by purchasers does not depend exclusively on a fraudulent motive for such abstinence; and that though it be true, that a purchaser will be fixed with the knowledge of such facts as would have been contained in answers, which he would have got if he had put questions, which he refrained from asking solely from the fear of the consequences, still, in my opinion, the rule goes beyond this, and that whenever, from the circumstances of the case, the purchaser is put on inquiry, he must be fixed with the knowledge which that inquiry would have produced, although the omission to put the question did not proceed from any fraudulent motive; and this is the rule as expressed by the Lord Chancellor in *Ware v. Lord Egmont* (a). I think that the knowledge that there were "charges" affecting the property of the *Rollasons* put the Messrs. *Williams* on inquiry what they were, and that they must be treated with having had the knowledge which would have resulted from such inquiries, if made.

1857.

JONES

v.

WILLIAMS.

The answer which is endeavoured to be given to this part of the case is two-fold. In the first place, it is alleged, that in substance such inquiries were made, and that the answer produced no information: and, secondly, that if not made in precise terms, it was immaterial, because, from the whole course of dealing and conduct of the *Rollasons*, it is obvious that the answer would have been, "the deeds deposited include the whole property, and there are no other incumbrances than those created by the will, and those which you possess." As to the first point, whether these inquiries were really made, this rests on the evidence of the clerk of Messrs. *Williams* (Mr. *Francis Deakin*). The way he states it is this :—

" In the

(a) 4 *De Gex, M. & G.* 460.

1857.  
  
 JONES  
 v.  
 WILLIAMS.

refused by them, they had recourse to the Defendants Messrs. *Williams*, bankers in *Wednesbury*, in the neighbourhood of *Bilston*, and requested them to make the advance, and offered as a security, for the sum of 3,000*l.*, which they required, to deposit the title deeds, both of the iron works and also of the cement and wire works. Messrs. *Williams* stated, that all the premises seemed united together, that they were used together by means of internal communication, and that the title deeds of the whole were offered to be deposited, and thereupon a parcel of deeds was deposited with them, which were, in fact, the deeds of *December*, 1854, conveying "the iron works," and also the deed of the 5th of *August*, 1843, conveying "the one-third" or smaller portion of the plot of ground, on which the cement and wire works stood. The deeds were sent to Mr. *Thursfield*, their solicitor, who prepared the memorandum of deposit, which was dated the 2nd of *February*, 1855, and was to this effect:—It was a memorandum "that *John*, *David* and *Benjamin Rollason* have deposited with Messrs. *Phillip* and *Henry Williams* the several deeds and writings included in the schedule hereunder written, as a security to them, their executors, administrators and assigns, and any who may become their partner, for repayment of the sums of money which, at any time thereafter, shall, from time to time, be due to *John*, *David* and *Benjamin*, or any or either of them, to Messrs. *Williams*, or their firm, together with commission and other usual bankers' charges and expenses."

The schedule referred to was as follows:—

"Schedule.

✱ "5th *August*, 1843.—Statutory indenture of this date made between," &c. &c. [stating the parties], being a conveyance

conveyance to "*Benjamin Rollason* (now deceased) of a piece of land at *Bradley* aforesaid."

1857.

JONES

v.

WILLIAMS.

"2nd *September*, 1844.—Probate copy will of the said *Benjamin Rollason*, deceased, of this date, proved," &c.

"30th *December*, 1854.—Indenture of this date, made between *James Kyrke* of the first part, *John Rollason*, *David Rollason*, and *Benjamin Rollason*, parties hereto, of the second part, and *John Whitehouse* of the third part, being a conveyance to the parties hereto of the second part, of another piece of land at *Bradley* aforesaid."

This memorandum was signed by the three *Rollasons* and witnessed by Mr. *Thursfield*.

The Court held, that this memorandum did not affect "the two-thirds" of the property which had been conveyed by the deeds of the 3rd and 4th *December*, 1840, although, from conversations with the three brothers, Messrs. *Williams* had been induced to believe it did.

The partnership between the three brothers was dissolved in *February*, 1855, when *John* retired; and, by an indenture of the 24th of *February*, 1855, he conveyed all the three properties and the machinery, &c., to hold the same, "subject nevertheless to all reservations of the mines and minerals and all mortgages and charges affecting the same," unto *David* and *Benjamin* in fee. *John* also assigned the partnership stock and assets to the continuing partners, and he covenanted that he had good title to convey, "subject and in manner aforesaid." *David* and *Benjamin*, on their part, covenanted



1857. to pay "all mortgage and other debts" due from the  
 JONES partnership, "whether the same are or are not charge-  
 v. able on the said hereditaments," and to indemnify *John*  
 WILLIAMS. against all personal liabilities.

The two brothers continued to carry on their trade, but got into difficulties, and Messrs. *Williams*, in *March*, 1855, brought an action against *David* and *Benjamin* for the balance due, upon which they signed the following memorandum :—

" *Wednesbury Oak*, 16th *March*, 1855.  
 " Messrs. *Philip* and *Henry Williams*.

" You having commenced an action against us for the balance of our overdrawn account at your bank, we hereby agree, in consideration of your staying proceedings, to execute and perfect to you a valid transfer and assignment of all our property at the wire works, *Pot-house Bridge*, by way of further security for the said balance, and also the balance due on *Rollason* and Sister's account, and also to place in your hands the transfer to us of our brother *John's* share in the *Coseley Works*, and to execute to you a valid legal mortgage of such works, the title deeds to which have been, sometime since, deposited with you."

On the 16th of *April*, 1855, *David* and *Benjamin* executed a mortgage to Messrs. *Williams*, and thereby, (after reciting the testator's will, the deed of 1854, and the deed of dissolution of 1855, the conveyance thereby by *John* to *David* and *Benjamin*, but omitting to state that it was subject to "all charges and mortgages affecting the same"), *David* and *Benjamin* conveyed to Messrs. *Williams* the two-thirds (stating the admeasurement), and also all other lands, hereditaments and appurtenances,

appurtenances, if any, thereto belonging or adjoining, and situate at *Bradley* aforesaid, belonging to *Benjamin Rollason*, deceased, and devised by his will, and all other the hereditaments devised by his will; and secondly, the iron works, by way of mortgage to secure 4,505*l.* and further advances. It did not appear that any inquiries had been made by Messrs. *Williams*, or their solicitor, as to the mortgages and charges affecting the property, except those stated by the *Master of the Rolls* in his judgment (*post*, p. 60). It also appeared that the mortgagors' solicitor having inserted in the power of sale enabling Messrs. *Williams* to sell the property mortgaged, (subject to or discharged from any existing charges thereon made by the will of the testator,) the words "or otherwise," Mr. *Thursfield* struck them out, writing in the margin "My clients have advanced their money on the faith that there are no other charges."

1857.  
JONES  
v.  
WILLIAMS.

Thirteen days after this mortgage, the Defendants, for the first time, had direct notice of the Plaintiffs' mortgage, which had been concealed by the mortgagors. To secure themselves the Defendants, on the 13th of June, 1855, got the term of 1,000 years created by the will of the testator assigned to a trustee for them, and they thus obtained the legal estate in the properties devised by the will.

Under these circumstances, the question was, whether the Plaintiffs' equitable mortgage, which was prior in date, had priority over the Defendants, who had the legal estate, and claimed to be purchasers for valuable consideration without notice.

Mr. *Lloyd*, Mr. *Speed* and Mr. *Wood*, for the Plaintiffs,

1857.  
  
 JONES  
 v.  
 WILLIAMS.

tiffs, cited *Worthington v. Morgan* (a); *Allen v. Knight* (b); *Hewitt v. Loosemore* (c); The Mayor of *Berwick v. Murray* (d).

Mr. *R. Palmer*, Mr. *Amphlett* and Mr. *Nalder*, for Messrs. *Williams*, cited *Finch v. Shaw*; *Colyear v. Finch* (e); *Jones v. Smith* (f); *Martinez v. Cooper* (g); *Ware v. Lord Egmont* (h); *Kennedy v. Green* (i); *Elliot v. Merryman* (k); *In re Langmead's Trust* (l); *Attorney-General v. Stephens* (m); *Greenwood v. Churchill* (n).

*The MASTER of the ROLLS* reserved judgment.

May 30. *The MASTER of the ROLLS.*

This is a suit by equitable incumbrancers on certain lands at *Bradley*, near *Wednesbury*, in the county of *Stafford*, seeking to enforce the payment of their charge against the Defendants. The first two Defendants are also mortgagees on this land, and the other two are the assignees of the mortgagors, who have become bankrupt. The question is one of priority of charge. The charge of the Plaintiffs is prior in point of date, but the Defendants allege, that they are, to the extent of their mortgage, purchasers for value without notice of the prior incumbrance, and that they have in them the legal

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|---------------------------------------------|-------------------------------------------|
| (a) 16 <i>Simons</i> , 547.                 | (h) 4 <i>De G., M. &amp; G.</i> 460.      |
| (b) 5 <i>Hare</i> , 272.                    | (i) 3 <i>Myl. &amp; K.</i> 699.           |
| (c) 9 <i>Hare</i> , 449.                    | (k) <i>Barnard</i> , 78; 1 <i>Tudor's</i> |
| (d) 3 <i>Jurist</i> , N. S. 1.              | <i>Lead. Cas.</i> 40 (1st edit.).         |
| (e) 19 <i>Beav.</i> 511; 5 <i>H. L.</i>     | (l) 20 <i>Beav.</i> 20.                   |
| <i>Cas.</i> 905.                            | (m) 6 <i>De G., M. &amp; G.</i> 111.      |
| (f) 1 <i>Hare</i> , 43; 1 <i>Phil.</i> 244. | (n) 6 <i>Beav.</i> 314.                   |
| (g) 2 <i>Russ.</i> 198.                     |                                           |

legal estate, and that, consequently, they are entitled to hold in priority to the Plaintiff's claim, until they are satisfied.

1857.

JONES  
v.  
WILLIAMS.

The first question is, over what land and on what property did the memorandum of equitable deposit to the Defendants of the 2nd of *February*, 1855, constitute an equitable mortgage? On this question, I am of opinion that it did not constitute any mortgage or equitable charge on the "two-thirds" of the land on which the cement and wire manufactory stood, and which two-thirds were conveyed by the deeds of the 3rd and 4th of *December*, 1840, which had been deposited with the Plaintiffs. I entertain no doubt, that the Messrs. *Williams* believed that the deed of *August*, 1843, conveyed the whole of this piece of land; and that if they were not so assured, in direct terms, they were induced to believe that this was so from the conversation between them and the three brothers. But assuming this to be so, still to treat it as an actual charge on the property not included in any of the deeds, would be giving a greater extent than would be possible to the doctrine of equitable deposits. The existing doctrine has often been said to set the Statute of Frauds at nought, but the extent to which this new doctrine, if it prevailed, must go, would be this:—That because certain deeds were deposited to secure advances, these deeds shall create a charge on land to which they do not relate, and in respect of which no deposit is made, by reason of the misrepresentation of the persons making the deposit, whereby the persons who advanced the money believed, that the deeds included other property than that which they actually did. If this were law, any deed might be deposited, with an allegation that it should be held as a deposit to charge any lands which were the property of depositors. In addition to which, it is to be observed, that

1857.  
JONES  
v.  
WILLIAMS.

that the Defendants had always the means, if they thought fit, of verifying the description of the parcels contained in the deed, by causing an actual admeasurement to be made of the land in question. Here the description is by yards, in another case it might be by acres, but the difference is not material. I think that they are not to be prejudiced, by reason of not having caused such measurement to be made; but, on the other hand, I think they can derive no advantage from such omission.

I think it probable, on the evidence, that the Plaintiffs also, when they took the deeds of the 3rd and 4th of *December*, 1840, thought that they had the deeds of the whole of the wire and cement manufactory, but I cannot therefore say, that their charge extended to the one-third included in the deed of *August*, 1843. In like manner, I am of opinion, that upon the deposit in 1855 it is impossible to hold, that the Messrs. *Williams* took a charge or advanced their money upon the security of the piece of land comprised in the indentures of the 3rd and 4th of *December*, 1840.

This being so, it remains to consider the effect of the subsequent acts between the *Rollasons* and the Messrs. *Williams*. In *February*, 1855, the partnership between the brothers was dissolved; and on the 24th of that month, *John* conveyed all his interest in the property in question, including the whole of the iron, wire and cement manufactory, and also his interest in certain other works, called the *Coseley Works*, to his brothers, "subject" (in express words) "to all the mortgages and charges affecting the same," which they covenanted to pay. The two brothers got into difficulties, and on the 16th of *March*, 1855, the Messrs. *Williams* brought an action against them for the balance due on their banking

ing account. As soon as the action was brought, the two brothers (*David* and *Benjamin*) signed a memorandum, undertaking to place in the hands of the Defendants the transfer of *John's* share in the *Coseley* works, and also all his share in the iron works, and the wire and cement works, and to execute a valid mortgage thereof to the Defendants Messrs. *Williams*. On the 24th of *March*, 1855, an abstract of the deeds was delivered to the solicitor of the Defendants, a mortgage was prepared accordingly, and this mortgage was executed on the 16th of *April*, 1855. This deed recites the deposit made in *February*, 1855, the dissolution of the partnership, the deed of 24th of *February*, 1855, and the debt due to the bank; it omits all mention of the deeds of the 3rd and 4th of *December*, 1840, or of the property therein comprised, but it contains general words, which are sufficient to cover all the property of the two brothers, including anything which was not comprised in the deeds deposited.

1857.  
  
 JONES  
 v.  
 WILLIAMS.

The question is as to the effect of this deed, and whether, under it, they, Messrs. *Williams*, can be treated as purchasers of the two-thirds of the cement and wire works comprised in the deeds of *December*, 1840, without notice of the Plaintiff's incumbrance. I think that they cannot. In the first place, they had distinct notice, by the deed of the 24th of *February*, 1855, which is recited in their mortgage, that the conveyance of *John's* share is made to his brothers, expressly "*subject to all mortgages and charges affecting the same*," which they covenant to pay. I consider this to be a distinct notice to them that there were mortgages or charges (in the plural number) affecting the same. They knew of two, viz., the charge created by the will of the father and their own charge; is this knowledge sufficient to exonerate them from all further inquiry

1857.

JONES  
v.  
WILLIAMS.

inquiry as to any charges affecting the same? I am of opinion that it is not; and that a person who advances money on the security of property, who is informed that there are "charges" affecting it, is not entitled to claim to be a purchaser without notice of these charges, because he believes that the two of which he is cognizant, and which might be sufficient to satisfy the words, are all the charges upon it. He is, in my opinion, bound to inquire whether these are all the charges affecting the property, and whether there are any others. The Defendants seek to enforce their right to include, under the general words, property not comprised in the particular description, and the deeds belonging to which were not in their possession or handed over to them. It is true that the Messrs. *Williams* believed that the particular description included the whole of the iron, wire, and cement works, and that they were led to believe this from the general words used by the *Rollasons*, that those were the deeds of their works; but this, as I have already observed, will not deprive the Plaintiffs of their rights, who were no parties to any misrepresentation. I do not, throughout the evidence, anywhere find, that this specific inquiry was made, viz., "Do the deeds deposited include every portion of your iron works, and of your wire and cement works at *Bradley*?" I do find a statement that the mortgage deed of 1855 would comprise the whole of this property, which is true, but which is a totally different matter; neither do I find anywhere a specific inquiry made to this effect, viz., "What are the mortgages and charges affecting the property, subject to which *John's* share in the property is conveyed to you?" The absence of such inquiries appears to me to be fatal to the claim of priority set up by the Messrs. *Williams*. I concur in the argument of the Plaintiffs' Counsel, that the rule, with respect to the consequence of abstaining from

from making inquiries by purchasers does not depend exclusively on a fraudulent motive for such abstinence; and that though it be true, that a purchaser will be fixed with the knowledge of such facts as would have been contained in answers, which he would have got if he had put questions, which he refrained from asking solely from the fear of the consequences, still, in my opinion, the rule goes beyond this, and that whenever, from the circumstances of the case, the purchaser is put on inquiry, he must be fixed with the knowledge which that inquiry would have produced, although the omission to put the question did not proceed from any fraudulent motive; and this is the rule as expressed by the Lord Chancellor in *Ware v. Lord Egmont* (a). I think that the knowledge that there were "charges" affecting the property of the *Rollasons* put the Messrs. *Williams* on inquiry what they were, and that they must be treated with having had the knowledge which would have resulted from such inquiries, if made.

1857.  
JONES  
v.  
WILLIAMS.

The answer which is endeavoured to be given to this part of the case is two-fold. In the first place, it is alleged, that in substance such inquiries were made, and that the answer produced no information: and, secondly, that if not made in precise terms, it was immaterial, because, from the whole course of dealing and conduct of the *Rollasons*, it is obvious that the answer would have been, "the deeds deposited include the whole property, and there are no other incumbrances than those created by the will, and those which you possess." As to the first point, whether these inquiries were really made, this rests on the evidence of the clerk of Messrs. *Williams* (Mr. *Francis Deakin*). The way he states it is this:—

"In the

(a) 4 *De Gex, M. & G.* 460.



1857.  
JONES  
v.  
WILLIAMS.

"In the month of *March*, 1855, I was directed by the Defendant *Philip Williams*, to make inquiries of *John Rollason*, *David Rollason* and *Benjamin Rollason*, as to the state of their pecuniary affairs, and in consequence of such direction, I inquired of *John Rollason* what the firm of *Benjamin Rollason* and Sons owed, and *John Rollason* then informed me that he was out of the partnership, and made a verbal statement to me as to the firm's liabilities, and mentioned the names of some of the persons to whom the firm owed money; but he did not tell me that anything was owing from the firm to the Plaintiffs, or make any statement to me from which the same could be inferred. I very shortly afterwards, and in the month of *March*, went to the offices of the *Bradley* works of the firm of *Benjamin Rollason* and Sons, and there met *John Rollason*, *David Rollason* and *Benjamin Rollason*, and requested them to lay a clear statement of their affairs before me, and I first asked them what their liabilities were, and they told me they owed various parties different sums of money, but *John Rollason*, *David Rollason* and *Benjamin Rollason* did not, nor did any or either of them, inform me that they owed to the Plaintiffs anything, or that the said Plaintiffs held any security of them, *John Rollason*, *David Rollason* and *Benjamin Rollason*, or any or either of them, for any sum of money, or make any statement to me from which the same could be inferred. *John Rollason*, *David Rollason* and *Benjamin Rollason* also enumerated to me the amount of their assets, and mentioned their book debts, stock, iron works, wire and cement works, and altogether made themselves out to be solvent, and in fact shewed an overplus in their own favour of about 4,000*l.*; but they did not, nor did any or either of them inform me, that there was any lien, charge or incumbrance upon the cement and wire works, or any part thereof, save only the amount secured to the

the Defendant *Philip Williams* and *Henry Williams*, and the legacies charged thereof by the will of *Benjamin Rollason* the testator."

1857.  
JONES  
v.  
WILLIAMS.

It is obvious from this, that Mr. *Deakin* made no inquiry respecting the securities held by the creditors of the firm; if he had, he would doubtless have said so. All that this evidence amounts to is this: that he asked for a statement of the affairs of the brothers, and that they gave him a list of their creditors and the amount of their debts. This, therefore, was not an inquiry on the subject which was most required.

With respect to Mr. *Thursfield*, he clearly purposely abstained from making any inquiry, for when, in the draft of the mortgage deed of the 16th of *April*, 1855, Mr. *Whitehouse* (the solicitor of the *Rollasons*), in the power enabling the Messrs. *Williams* to sell the property mortgaged, either subject to or discharged from any existing charges thereon, made by the will of *Benjamin Rollason* deceased, had inserted the words "or otherwise" after the words "*Benjamin Rollason*, deceased," Mr. *Thursfield* struck out the words, "or otherwise," writing in the margin, "my clients have advanced their money on the faith that there are no other charges." This was true, but, by this deed, they were taking additional security not included in the deeds deposited for the money so advanced by them. If the money had not previously been advanced, can anybody doubt, looking at the care Mr. *Thursfield* took throughout this matter, that he would not have asked, "What other charges are there?" It is in substance this:—"I don't inquire after or regard other charges, because my clients are, to the extent of their charge, purchasers for value, without notice of any prior incumbrances," which was true, so far as regards the  
one-third

1857.

JONES  
v.  
WILLIAMS.

one-third of the wire and cement works, but was not true as regarded the additional land included in the new security, viz., the iron works, of which they were becoming mortgagees by specific description, and the remaining "two-thirds" of the wire and cement works brought, by the general words, into their security. These "two-thirds" were subject to a prior charge; they had notice of existing "charges," and they did not inquire for them, and they had distinct notice that *David* and *Benjamin*, the mortgagors, took the property mortgaged by them subject to all existing charges. In my opinion they do not, by their course of conduct, obtain priority over the Plaintiffs' charge, any more than they would over a prior charge on the iron works, if any such had existed.

With respect to the argument, that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith* (a), that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion, that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what *A.* would have said if *B.* had said something other than what he did say. Certainly *Kennedy v. Green* (b) lays down no such doctrine, nor is it at all applicable to the present case. It is always the first cited in all causes depending on questions of motive, but, in truth, it rarely has any application to any one of them.

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(a) 1 *Hare*, 55.

(b) 3 *Myl. & K.* 699.

The case of *Greenwood v. Churchill* (a) is a very peculiar case, and though at first I thought that it might govern this case, it does not appear to me on examination of it to affect the rights of the parties. In that case, *Benjamin* had a charge of 8,000*l.* on the estate of *Samuel* his brother; he assigned 6,000*l.*, part of that charge, to the trustees of his marriage settlement, and he then joined with his brother in conveying the property to trustees, subject to existing incumbrances, to raise money by sale or mortgage to pay debts, under which deed a mortgage of the whole property was made to Lord *Carrington*, and afterwards to the Plaintiff; but the trustee, finding this legacy charged on the property, required, before the mortgage was made, that the charge should be released, and *Benjamin* accordingly released the estate from the charge, stating nothing respecting his assignment of part of it to the trustees of his marriage settlement. But, in that case, Lord *Carrington* had the legal estate, and was admitted to be the first incumbrancer, and the Plaintiff had given up a judgment for her mortgage on the equity of redemption. She had, in fact, become a mortgagee, on the faith and upon legal evidence that this particular charge had been removed from the estate, and although it was a fraud on the assignees of that charge, it was held that they could not enforce it afterwards in priority to the Plaintiff. The case is perfectly distinct from the present, and could apply only in case the Messrs. *Williams*, having direct notice of the Plaintiff's charge, had received clear legal evidence of the release of it by deed.

1857.  
  
 JONES  
 v.  
 WILLIAMS.

On the whole consideration of this case, I see nothing to affect the priority of the Plaintiff's charge on the  
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(a) 8 *Beav.* 413.

1857.  
  
 JONES  
 v.  
 WILLIAMS.

two-thirds of the wire and cement works included in the deeds of 3rd and 4th *December*, 1840. Accordingly I am of opinion, that they are entitled to the ordinary decree of redemption and foreclosure as regards the two-thirds against the Defendants Messrs. *Williams*, and to payment of what is due to them in respect of the charge of 650*l.*, created by the will of the testator for the benefit of his daughter, and secured by the term of 1,000 years. The Plaintiffs and Defendants must add their costs to their securities.

1856.

*Nov.* 24.

1857.

*Re* JENKINSON.

*Jan.* 14, 15.

In 1852, *A.*, the tenant for life, and *B.*, his nephew, and tenant in tail, entered into an arrangement, by which they barred the entail, and conveyed the property to such uses as they should jointly appoint, and subject thereto to the old uses. By a cotemporaneous deed, in execution of the joint power, *A.* secured to *B.*

IN 1807, *Charles*, the first Lord *Liverpool*, by his will, bequeathed his residuary personal estate upon trust to invest it in land to be settled to certain uses, and part of the fund has accordingly been invested in an estate in *Wiltshire*.

In 1809, *Robert*, the second Lord *Liverpool*, by deed, settled lands in *Gloucestershire* to the same uses.

Under this will and deed, Sir *Charles Jenkinson* (the nephew of the first lord) was, in *September*, 1852, the tenant for life in possession of this property, with remainder to his first and other sons in *tail male*, with remainder to his nephew Sir *George Jenkinson* in tail.

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a life annuity on the property, and *B.* secured 25,000*l.*, payable when he, *B.*, came into possession. Of this, 20,000*l.* was settled, cotemporaneously, on *A.*'s daughters, and the remainder on *A.* Held, on the death of *A.*, in 1855, that succession duty (under the Act of 1853) was payable on the 20,000*l.* as a succession from *A.*, but that no succession duty was payable on the remaining 5,000*l.*

Sir *Charles Jenkinson* had issue daughters only, for whom he was anxious to make a provision, while, on the other, Sir *George Jenkinson* was desirous of securing for himself a present income. They therefore came to an agreement by which Sir *Charles Jenkinson* was to pay to Sir *George Jenkinson* 2,250*l.* a-year for his, Sir *Charles's*, life, and Sir *George Jenkinson* was to charge his reversionary estate with 25,000*l.* for the benefit of Sir *Charles Jenkinson* and his daughters. This arrangement was effected by the following deeds.

1857.  
  
 Re  
 JENKINSON.

On the 8th of *September*, 1852, Sir *George Jenkinson*, with the concurrence of Sir *Charles*, as the protector, executed a disentailing deed, by which the estates in *Wiltshire* and *Gloucestershire*, and the personalty uninvested, were conveyed to such uses as Sir *Charles Jenkinson* and Sir *George Jenkinson*, during their lives, should appoint, and in default to the uses to which the property then stood limited.

By a deed dated the day following (9th *September*, 1852), reciting that it had been agreed that Sir *Charles* should secure the annuity of 2,250*l.* to Sir *George*, and that in consideration thereof, he, Sir *George*, should join with Sir *Charles* in charging the property, in exercise of the joint power of appointment, with the 25,000*l.*, for the benefit of Sir *Charles*, his daughters, or their husbands and issue in manner thereafter mentioned, Sir *Charles* covenanted to pay an annuity of 2,250*l.* to his nephew Sir *George Jenkinson*, and in order to secure it, demised his life estates in the real and personal estates to trustees for a term. Sir *Charles* and Sir *George* then, in pursuance of their power, appointed the estates, after the decease of Sir *Charles*, and subject to the preceding uses, to trustees for a term, upon trust, after the decease of Sir *Charles*, to raise the 25,000*l.*,

1857.  
Re  
JENKINSON.

with interest from the death of Sir *Charles*, which they were to stand possessed of, upon trust, as to 5,000*l.*, as Sir *Charles* should appoint, and as to 20,000*l.*, upon such trusts as were declared by another deed of even date. Subject thereto the estates were appointed to Sir *George* absolutely. The personal estate not already invested in land was in like manner charged with the 25,000*l.* And it was thereby agreed and declared, that nothing therein should be construed to create any debt on the part of Sir *George*, in respect of the sum of 25,000*l.*, unless and until Sir *George* should, under the said will of the first Earl, and the settlement by the second Earl, have become tenant in tail in possession of the estates and funds thereby respectively settled; provided always, that if and when Sir *George* should have so become tenant in tail in possession, the said sum of 25,000*l.* and interest should become and be a debt payable by Sir *George* his heirs, executors and assigns.

By a second indenture bearing date the 9th day of *September*, 1852, and made between Sir *Charles*, of the first part, Sir *George* of the second part, and trustees of the third part, it was declared, that the trustees should stand possessed of the 20,000*l.* in trust, in third parts, for the three daughters of Sir *Charles*, respectively, their husbands and children, and in default of children, for the next of kin of the daughters.

Sir *Charles* died without male issue on the 6th of *March*, 1855. The 25,000*l.* then became payable, and was paid by Sir *George Jenkinson* to the trustees, who paid it into Court, under the *Trustee Relief Act*.

The 5,000*l.* had been paid out of Court, and a petition having been presented, by the daughters of Sir *Charles* and their families, for payment out of Court of the  
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the 20,000*l.*, a question arose, as to what succession duty was payable on the fund. The Court thereupon required the Crown to be represented.

1857.  
  
*Re*  
 JENKINSON.

By "The Succession Duty Act, 1853" (16 & 17 *Vict.* c. 51, s. 2), it is provided as follows:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act [19th *May*, 1853] either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession,' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

The 10th section fixes the rate *per centum* at which the duty is to be levied.

In this case, Sir *Charles* and the father of Sir *George* were sons of a brother of the first lord, and if Sir *George* should be held to be the "predecessor" as to this fund, the duty chargeable was at the rate of 5*l.* per cent., the "successors" (the daughters of Sir *Charles*) being descendants of a brother of the father of the "predecessor."



1857.

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Re

JENKINSON.

But if Sir *Charles* should be held to be the "predecessor," the duty would be at the rate of 1*l.* per cent.

If it should be held that the fund was not a succession at all, but a mere incumbrance, for which no deduction was to be made by Sir *George*, then the duty would be at 3*l.* per cent., as a portion of Sir *George's* own succession, so far as it was derived from the first Lord *Liverpool*.

Mr. *Lloyd* and Mr. *G. L. Russell* for the Petitioners.

There are four ways in which this 20,000*l.* may be regarded : first, as a "succession" from the Earls of *Liverpool* ; secondly, as a "succession" from Sir *George* ; thirdly, as a "succession" from Sir *Charles* ; and fourthly, as not being a "succession" at all within the Act.

It is not a succession but a mere debt under a contract, which might be recovered from Sir *George* under his covenant, without reference to the property ; and by the 17th section a debt is not chargeable with succession duty. If it be regarded as an incumbrance on the property, then, under the 34th section, no allowance is to be made in respect of any incumbrance created by the successor ; and therefore, practically, the duty, if any, will fall on Sir *George*. If it were otherwise, he would escape the duty altogether, if he had sold the whole reversion for an annuity.

At all events, 1*l.* per cent. only is chargeable, as a succession to the daughters from their father, Sir *Charles*, for they have no claims to any provision or settlement under the Earls or under Sir *George*.

Mr.

Mr. *C. Hall* for the parties entitled to the 5,000*l.*

1857.

The 5,000*l.* was a debt due to Sir *Charles* from Sir *George* prior to the Act. Sir *Charles* was the owner of that sum, and therefore both predecessor and successor, and he has appointed it to himself. The case therefore comes within the exception of the 12th section, and this fund is not chargeable. Again, this sum formed part of Sir *Charles*' personal estate, and became subject to legacy duty ; it is therefore free from succession duty under the 18th section.

Re  
JEWELSON.

Mr. *Giffard* for Sir *George*.

Whatever duty may be payable on the 25,000*l.*, it is in respect of a distinct succession, from which Sir *George* is free. The Petitioners have overlooked the 15th section, which is in these terms.

“Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the 2nd section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof, as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with, if no such alienation had been made, or derivative title created ; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, have become vested by alienation, or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable

1857.

Re  
JENKINSON.

payable if no such alienation had been made or derivative title created ; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

Therefore the Petitioners, and not Sir *George*, are chargeable with the duty in respect of the 20,000*l.*, which is the same as Sir *George* would have been chargeable with if no alienation had been made.

The *Attorney-General*, Mr. *Hansard* and Mr. *Thring* for the Crown.

The money is not a debt within the 17th section, because the Petitioners were not the contracting parties, and there was an independent "disposition or devolution of the moneys payable," so as to make it chargeable under the 17th section, Sir *George* being the "obligor" under the 2nd section.


But taking the three deeds as one transaction, then the Petitioners claim under the joint appointment of Sir *Charles* and Sir *George*, both of whom must be regarded as "predecessors" or settlers; and under the 13th section, unless the commissioners agree as to the duty payable, the "successors" must be deemed to have derived their "succession" in equal proportions from each predecessor, and are chargeable with duty accordingly; that is, 1*l.* per cent. on one half, and 3*l.* per cent. on the other.

The other view is, that Sir *Charles* purchased a debt from Sir *George*, payable on the death of Sir *Charles*, and settled it on his daughters and their issue, in which case 1*l.* per cent. is chargeable.

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*The MASTER of the ROLLS.*

My opinion is in favour of the Petitioners. The case is of some importance, and I think that the evidence upon which the case must proceed is best derived from the deeds themselves.

1857.  
  
*Re*  
**JENKINSON.**  
*Jan. 15.*

The 2nd clause of 16 & 17 *Vict.* c. 51, which relates to this subject, so far as it is here material, is to this effect:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred, or to confer on the persons entitled by reason of any such disposition or devolution a 'succession,' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote settlor, disponent, testator, obligor, ancestor, or any other person from whom the interest of the successor is or shall be derived."

This is a "future disposition of property," upon which it must be held that the Petitioners are the "successors," and the question is, who is the "predecessor" under this Act? I find this state of circumstances:—In *September*, 1852, *Sir Charles Jenkinson*, being tenant for life, with remainder to *Sir George* in tail, executes a deed, conjointly with *Sir George*, in which they recite that the entail cannot be barred with-  
out

1857.  
  
*Re*  
 JENKINSON.

out the concurrence of Sir *Charles*, that he is desirous to make a settlement upon his daughters, his only issue, and that for that purpose, and that alone, Sir *George* concurs in the execution of the disentailing deed. Then, in consideration of an annuity of 2,250*l.* a year, which is to be paid or covenanted to be paid to Sir *George*, during the life of Sir *Charles*, until he shall come into possession of the property, and then upon his coming into possession of the property, but not until then, is this charge of 25,000*l.* to arise. Upon that state of the case, it must be taken to be clear, that the proceedings emanated from Sir *Charles*, who was desirous of settling a sum of money upon his daughters, and that he is the settlor of that sum of money, and that Sir *George* consented and agreed to join with him to enable him to make that settlement, and that Sir *George* received a pecuniary consideration for enabling Sir *Charles* to make that settlement. The case would be materially altered, as to the rate of duty to be paid by the Petitioners, though it might not affect the rate of duty to be paid by Sir *George* to the Crown (which is a separate and independent matter), if there had been no consideration whatever paid to Sir *George*, as then his only motive for joining in the settlement would have been "natural love and affection," to persons who were related to him in blood, though not very closely. But he received a consideration for this charge upon his estate, which was to be paid on the death of Sir *Charles*, and settled on Sir *Charles's* daughters.

The recital in the second deed, taken by itself, would point to a bounty flowing from Sir *George* towards his cousins, but taken in conjunction with the deed of appointment and the rest of the transaction, it is not, in my opinion, sufficient to counterbalance the evidence derived from the other parts of the case.

It

It was suggested that the 15th clause has reference to this question, where any reversionary property is vested by alienation in any other person than the successor, such person is to pay exactly the same rate of duty as the alienor would have had to pay upon it. But I am unable to concur with Mr. *Giffard* in that view of the case; it does not appear to me that the 25,000*l.* can be called a reversionary property. The only question here is, what is the property settled, which is to pay duty? It is no portion of the estate, it is a sum of 25,000*l.* which is charged upon that estate, and also upon the residuary personal estate of the first Earl of *Liverpool*; and being so charged, it cannot be properly stated to be a portion of the estate itself, which is so settled, but it is a sum of money by way of charge which is so settled. In order to be reversionary property (and no doubt a sum of money may be reversionary), it is necessary to consider what existence it had during the life of Sir *Charles*, because that is reversionary which is subject to a present interest in some other person. If this 25,000*l.* had been given to Sir *Charles* for life, by a previous settlement, and afterwards to his daughters, then it would have been reversionary, according to the proper meaning of that word, but the interest in a sum of money cannot be called reversionary where the sum itself has no existence, which does not arise till a future, distant and contingent event; which it was here, because it was always possible that Sir *Charles* might have issue male, in which case this sum of money would never have had any existence. It is impossible, in my opinion, correctly to say that a sum of money, which is to be raised upon the death of a person in existence, is a reversionary fund, *viz.* that it is an existing sum of money settled in a particular way.

1857.

Re  
JENKINSON.

I must,

1857.  
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 Re  
 JENKINSON.

I must, therefore, hold, that Sir *Charles* is the "settlor," and that the duty is payable by the Petitioners, only in respect of their relationship to Sir *Charles*.

With respect to the 5,000*l.*, I think it was a debt for valuable consideration from Sir *George* to Sir *Charles*, but payable after his death, and therefore that it comes within the exception of the 17th section.

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THE CROMFORD AND HIGH PEAK RAILWAY COMPANY *v.* THE STOCKPORT, DISLEY AND WHALEY BRIDGE RAILWAY COMPANY.

May 27.

The Defendants were by Act of Parliament authorized to make a short line uniting their main line with the Plaintiffs' line, but the 12th section prohibited the Defendants opening their main line until the junction should be completed.

THE Plaintiffs' railway had been constructed under an Act of 6 *Geo.* 4, c. xxx.

The Defendants had obtained authority to construct their railway by an Act of the 17th and 18th *Vict.* c. cc.

It became advisable to connect the two railways by a short junction line. Accordingly, by the 18 & 19 *Vict.* c. lxxv. (which was passed on the 26th of *June*, 1855.) the Plaintiffs (The *Cromford and High Peak* Railway Company) were authorized to make the extension

In default of the Defendants making the junction within a specified time, the Plaintiffs were authorized to make it. The Defendants proposed opening their main line before the completion of the junction. Held, that the Plaintiffs had a sufficient interest to entitle them to an injunction to prevent this proceeding, and that it was not necessary to resort to an information for that purpose, and an injunction was granted, although the delay in opening the main line might be prejudicial to the public.

sion or junction between the two railways. The 64th, 65th and 74th sections of the Act were as follows:—

XLIV. That the deviation and extension shall be completed within five years from the passing of this Act, and on the expiration of such period, the powers by this Act granted to the company for executing the deviation and extension, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the deviation and extension as shall then be completed.

LXV. That in case the said extension railway shall not be completed and opened for public traffic within the period aforesaid, then and from thenceforth it shall not be lawful for the company, or the directors thereof, to pay any dividend to the shareholders, on the ordinary or unguaranteed capital of the company, until such extension railway shall have been completed and open for public traffic: provided always, that the completion of the extension railway, the *Stockport, Disley and Whaley Bridge* Railway Company, as hereinafter mentioned, shall be deemed and considered the completion thereof by the company.

LXXIV. And whereas a bill has been introduced into parliament in the present session, to enable the *Stockport, Disley and Whaley Bridge* Railway Company to make an extension from their railway to the *Cromford and High Peak* Railway, and the line of such extension is identical, or nearly so, with the extension or new line of railway between the same points hereby authorized, and it is expedient that one line only should be formed, for the joint purposes of the two companies: therefore, if the said bill shall pass into a law, in the present session, the said company shall not make any portion of the said extension or new line of railway,

1857.

The CROM-  
FORD and  
HIGH PEAK  
RAILWAY  
COMPANY

v.  
The STOCK-  
PORT, DISLEY  
and WHALEY  
BRIDGE  
RAILWAY  
COMPANY.



1857.  
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 The CROM-  
 FORD and  
 HIGH PEAK  
 RAILWAY  
 COMPANY  
 v.  
 The STOCK-  
 PORT, DISLEY  
 and WHALEY  
 BRIDGE  
 RAILWAY  
 COMPANY.

railway, or purchase or take any portion of the lands described upon the plans hereinbefore mentioned, relating to such extension or new line of railway, unless the *Stockport, Disley and Whaley Bridge* Railway Company shall fail to purchase within three years from the passing of "The *Stockport, Disley and Whaley Bridge* Railway Act, 1854," the lands requisite for the completion of such extension, or shall fail to complete such extension within four years from the passing of such last-mentioned Act, or at such earlier period as the *Stockport, Disley and Whaley Bridge* Railway Company may open for traffic the *Stockport, Disley and Whaley Bridge* Railway.

By a subsequent Act, the 18th and 19th *Vict. c. cxxx.* (which passed the 16th of *July*, 1855,) power was given to the *Stockport, Disley and Whaley Bridge* Railway Company to make the junction line (s. 3) within four years from the 31st *July*, 1854 (s. 10); and by the 12th section, it was provided, that "the railway, by the *Stockport, Disley and Whaley Bridge* Act authorized, should not be opened for public traffic, until the junction railway, by that act authorized, should be completed and ready for traffic." By the 18th section, the Plaintiffs were to contribute 3,750*l.* (half the estimated expenses of the junction line) towards the general undertaking of the Defendants, and shares to that amount were to be allotted to the Plaintiffs accordingly.

The compulsory powers were to cease at the end of five years from the passing of the act (s. 64), and if the extension railway should not be completed and opened for traffic within that period, no dividends were to be paid to the shareholders until it should be completed and open for traffic (s. 65).

The

The Defendants having completed their main line, but not the junction line, proposed to open the main line alone on the 28th of *May*. This being opposed to the express enactment of the 12th section of the Act, the Plaintiffs instituted this suit to restrain the Defendants from opening and using their main railway, until the junction railway should be completed and ready for traffic.

1857.

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The CROM-  
FORD and  
HIGH PEAK  
RAILWAY  
COMPANY  
v.  
The STOCK-  
FORT, DISLEY  
and WHALEY  
BRIDGE  
RAILWAY  
COMPANY.

The Defendants stated, that the construction of the junction line had been retarded by the unfavourable state of the weather; that considerable progress had been made, and that they intended to complete the junction "as soon as possible," or, as was stated, somewhat vaguely, in another passage, "in about two months."

The Defendants also asserted, that great inconvenience would arise to the public, in consequence of the usual arrangements for running coaches not having been made, in the expectation of the opening of the Defendants' main line, and that great injury would ensue to the trade of the district, if the opening of the main line should be delayed. That the delay in opening the junction line would cause no injury to the Plaintiffs, inasmuch as the branch would be completed as soon as the Plaintiffs would be able to avail themselves of it. The latter statement was denied.

Mr. *R. Palmer* and Mr. *Amphlett* for the Plaintiffs, argued that the Defendants were bound strictly by the terms of the Act, which was prohibitory. They cited *Gray v. The Liverpool and Bury Railway Company* (a); *Carlisle v. The South-Eastern Railway Company* (b).

Mr.

(a) 9 *Beav.* 331.

(b) 13 *Beav.* 295.

1857.

Mr. *Selwyn* and Mr. *Townsend* for the Defendants.

The CROM-  
FORD and  
HIGH PEAK  
RAILWAY  
COMPANY.  
v.  
The STOCK-  
PORT, DISLEY  
and WEALEY  
BRIDGE  
RAILWAY  
COMPANY.

Even if the Defendants should be acting in a manner unauthorized by the Act, yet the act is not "shewn to be such as will occasion substantial loss or damage to the Plaintiffs," and the Court will not, therefore, at their instance, be justified in interfering; The Mayor of *Liverpool* v. The *Chorley* Waterworks Company (a).

To delay the opening of the main line will create great public inconvenience, and no injury will be done to the Plaintiffs by opening it, for the junction line will be open as soon as they can avail themselves of it, and therefore the Plaintiffs have no substantial grounds of complaint.

The Plaintiffs are not the parties to avail themselves of this clause, but it is the right of the *Attorney-General* alone to interfere.

The Plaintiffs have applied to the Board of Trade to cause the opening of the main line to be delayed, but the Board has declined to exercise its powers, and has refused to interpose. [They also cited The *Attorney-General* v. The *Birmingham* and *Oxford* Junction Railway Company (b).]

*The MASTER of the ROLLS* (without calling for a reply).

I think that the words of the Act of Parliament are too strong in this case.

There are, in fact, two questions here : one with respect to

(a) 2 *De G., M. & G.* 852.

(b) 18 *Law Times*, 33.

to the duties and powers of the Defendants under this Act of Parliament, and the other, how far the Plaintiffs are the persons to enforce them, and to insist on their being carried into effect.

1857.

The CROM-  
FORD and  
HIGH PEAK  
RAILWAY  
COMPANY

v.

The STOCK-  
PORT, DISLEY  
and WHALEY  
BRIDGE  
RAILWAY  
COMPANY.

I will, in the first place, consider the effect of the Act of Parliament with reference to which the case of *The Mayor of Liverpool v. The Chorley Waterworks Company* (a) is cited. I fully accede to the principle of that case, and a great number of cases may be cited in which the same principle has been acted upon, and I have acted upon it repeatedly myself. But that case appears to me to differ materially from the present. The *Chorley Waterworks Company* had power given them by the Act of Parliament to supply *Chorley* with water, and the 32nd section enacted, that where the water should be conveyed by an open watercourse, it should be filled with broken stones to the level. The company were proceeding to convey water by a tunnel or culvert instead of by an open drain filled with stones, and the evidence shewed that, upon the whole, a culvert was the more convenient mode of effecting the object, and that the Plaintiffs were not in the slightest degree prejudiced by the variation. The question would have been perfectly distinct, if the Act of Parliament had gone on expressly to prohibit the conveyance of the water by culvert. But in that case, there was merely an enabling clause, empowering the company to accomplish a certain work, and to convey water to a certain place. Generally speaking that must be done in the mode specified, but if it be done in a more convenient way and without injury to any one, that would not, *primâ facie*, be a violation of the Act of Parliament.

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(a) 2 De G., M. & G. 852.

1857.

The CROM-  
 FORD and  
 HIGH PEAK  
 RAILWAY  
 COMPANY  
 v.  
 The STOCK-  
 PORT, DISLEY  
 and WHALEY  
 BRIDGE  
 RAILWAY  
 COMPANY.

If there was power to construct a railway by embankment from one point to another, it would not be a violation of the Act to do it by a viaduct, instead of an embankment; it would be only another mode of accomplishing a particular object. But here is a clause which expressly prohibits the main line being opened for public traffic until the junction railway "shall be completed and ready for traffic." The legislature had its views and acted advisedly when it introduced that distinct prohibition into the Act of Parliament. Is it possible, assuming the Plaintiffs are in a situation to enforce the performance of the duties imposed by that clause, for this Court to disregard it, and hold that the Defendants may open their main line before the junction line, although the legislature has said they shall not? I apprehend that this Court would be going far beyond any power it possesses, or has ever assumed to possess, if it were to act contrary to an express direction in an Act of Parliament. There is no penalty it is true, but the Court cannot go against an Act of Parliament. It is clear it was not so in the case of the *Chorley Waterworks*, because there, they only accomplished an end authorized by the Act but in another mode. There the clause was permissive, which is distinct from this, which is prohibitory. When the clause is permissive it enables the object to be attained in the best way it can be, provided no injury is thereby done to other persons, because the Act merely points out the sort of mode in which the object shall be accomplished; but here the clause of the Act expressly provides, that a particular thing shall not be done until another thing has been completed. I apprehend that this Court has no power to say that a thing may be done, when the legislature has positively declared that it shall not be done.

That being so, the next question is, whether the  
 Plaintiffs

Plaintiffs are the persons who can properly call on the Court to enforce the Act. That resolves itself into two questions: one is, as to the interest of the Plaintiffs, and the other, whether, by any acts of theirs, they have precluded themselves from applying to this Court for that purpose. I fully concur in the argument, that if they have no interest in the matter, the proper mode of proceeding is by putting the *Attorney-General* in motion on behalf of the public, by a proceeding in which they should be Relators. But how is it possible for me to say, on this motion, that the Plaintiffs have no interest in the junction line, and that they have no right to enforce the Act with respect to it. It is clear that the legislature had some motive for inserting this clause, and on looking at the Act, there can be no question that the motive was, to give a sufficient security to the Plaintiffs that the junction railway should be proceeded with as speedily as possible. The Plaintiffs have, therefore, a right to enforce this clause, and to the assistance of the Court, and to insist, that this express provision, introduced into the Act for their benefit, should not be violated. I think that they have a sufficient interest in the matter, and that, at their instance, an application may be made to enforce the provisions of this Act by means of the powers of this Court.

Upon the evidence, as it at present stands, (without expressing any opinion as to what will be the ultimate result of the evidence,) I assume that the public will be prejudiced by the order I am about to make, that the public would gain an advantage by the main railway being opened, that it is in a fit state to be opened, and that, upon the evidence, as it at present stands, it may be questionable whether the Plaintiffs will obtain any benefit by the order; but I consider the clause in the Act of Parliament to be im-

1857.

The CROM-  
FORD AND  
HIGH PEAK  
RAILWAY  
COMPANY  
v.  
The STOCK-  
PORT, DISLEY  
AND WHALEY  
BRIDON  
RAILWAY  
COMPANY.

1857.

The CROM-  
FORD and  
HIGH PEAK  
RAILWAY  
COMPANY

v.

The STOCK-  
PORT, DISLEY  
and WEALEY  
BRIDGE  
RAILWAY  
COMPANY.

perative, and that this Court is bound to enforce it, either at the suit of the *Attorney-General*, on an information at the instance of the public generally, or at the suit of the Plaintiffs, who have, by the Act of Parliament, an interest in the matter. It is upon that ground I proceed.

Then, as to the acts of the Plaintiffs precluding them; if they had entered into any solemn engagement that they would not enforce this clause, I should say, "whatever others may do, you are not the proper persons to come here; it is true that on a proper occasion the Court would enforce the Act, but you have bound yourselves not to make the application." Notwithstanding the Act quoted, the Board of Trade had no jurisdiction to do more, than to ascertain whether, in an engineering point of view, the railway was in a fit state to afford the proper accommodation to the public.

[The Court next examined the acts and conduct of the Plaintiffs, and came to the conclusion that they were not such as to preclude their obtaining the relief they now asked.]

My opinion is, that I am bound to give effect to the clause in the Act of Parliament, and that the Plaintiffs are persons who have, under the Act of Parliament, sufficient interest to entitle them to call upon the Court to do it, without putting in motion the *Attorney-General*, and that the Plaintiffs' acts have not precluded them from making the application.

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NOTE.—The Lords Justices, on appeal, suspended the operation of the injunction until the 29th of *July*, the Defendants undertaking to use all practical diligence in completing the branch railway (28th *May*, 1857).—M.S.

1857.

FINDON v. FINDON.

**A** TESTATOR bequeathed as follows:—"I also bequeath to my dear daughter a like annuity of 100*l.*, payable to her while she remains sole and unmarried; but on her marriage, and on some adequate provision made by some settlements made for her for life and to the use of her issue, which provision I direct may be made, I bequeath to and for her use the sum of 2,500*l.*; *in default of such issue*, I bequeath that sum for the benefit of my grandchildren *then* living, the children of my eldest son Francis, equally.

The testator died in 1825, and the Defendant proved his will.

In 1827, the testator's daughter married Mr. *Demainbray*, but no settlement was made on her marriage; the 100*l.* was, however, paid to her during her life. She had issue one child only, who died when of very tender age in 1834.

Mr. *Demainbray* died in 1846, and the testator's daughter died in 1856, without having had any other issue.

The two Plaintiffs were children of the testator's eldest son *Francis*.

The Plaintiffs insisted, that by the death of the testator's daughter without issue living at her death,

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*April 17.*  
A testator bequeathed an annuity of 100*l.* to his daughter while sole, but on her marriage, and on some adequate provision made by some settlement for her life and to the use of her issue, which he directed should be made, he bequeathed to her 2,500*l.* In default of such issue, he bequeathed that sum to the children of his son. The daughter had one child only, who died in her lifetime, of tender years. Held, that the gift over to the children of the son altogether failed.



1867.  
  
 FINDON  
 v.  
 FINDON.

they became absolutely entitled to the 2,500*l*. They instituted this suit against the executor for a declaration to that effect, and for payment, or, in the alternative, a declaration that it fell into the testator's residuary estate, and that the Plaintiffs' share thereof, as two of the residuary legatees, might be paid to them.

The Defendant claimed the fund as representative of the testator's daughter.

Mr. *Lloyd* and Mr. *Morris* for the Plaintiffs.

Mr. *R. Palmer* and Mr. *Whitbread* for the Defendant.

*Campbell v. Harding (a)*; *Stanley v. Jackman (b)* were cited.

*The MASTER of the ROLLS.*

In the view I take of this case, the gift over does not take effect.

It is a gift over in default of such issue; I must look at it in two points of view, first as an executed, and secondly as an executory bequest. If I regard it as a bequest executed, then, in the strict sense of the term, the gift over in default of such issue can only take effect in case this lady had no issue, and that event has not occurred, because she had a child who died in her life.

But looking at it in the other way, which I think the more proper mode of looking at it:—namely, what I should have done if I had directed a settlement of the fund, or what the Court would have done in this case, upon the marriage

(a) 2 *Russ. & M.* 390.

(b) 23 *Beav.* 450.

marriage of this lady, if an application had been made to the Court to direct a settlement of this fund to be made. In such a case, I should have treated this as an executory disposition by the testator. He gives to his daughter 100*l.* a-year, but with these directions:—"But on her marriage and on some adequate provisions made for her for life, and to the use of her issue, which provision I direct may be made, I bequeath to and for her use 2,500*l.*" The objects were his daughter and her issue, and he was desirous to settle a sum of 2,500*l.* for the benefit of her and her issue. He goes on:—"in default of such issue, I bequeath the sum for the benefit of my grandchildren then living, the children of my eldest son *Francis*." In my opinion that means:—as to what I shall settle, I consider the lady and her issue the objects of my bounty, they are to take the whole, and the gift over is only to take effect if she shall have no issue. It is like the case where the word "having" has been held "having had"(*a*).

1857.

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 FINDON  
 v.  
 FINDON.

I should have settled it in such a manner as to give it to the daughter and her issue to dispose of the whole, with a gift over only in case of no child being born. It is not necessary to consider whether I should give the children vested interests on their birth or not, because I should have so settled it, that the whole interest would have vested in her, in case the gift over did not take effect, and this could only take effect in the event of no child being born. Consequently I shall hold, that the Defendant, who represents all the interests, takes the 2,500*l.*

Dismiss the bill.

(*a*) *Weakley d. Knight v. Rugg*, 7 Term R. 322.

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NOTE.—Affirmed by the Lord Cranworth, 26th July, 1857.

1857.

1856.

June 25.

1857.

## DEVAYNES v. ROBINSON.

April 22, 23.

A testator, who died in 1841, directed his trustees to sell his real estate, and giving them some discretion therein. Instead of selling, they mortgaged, and retained the estate. Held, that they had committed a breach of trust, and the estate having become depreciated, that they were liable for the loss. Held, also, that the mortgage was void as against the mortgagee with notice, but that he was entitled to stand as a creditor on the produce of the estate, to the extent to which the mortgage money had been properly applied.

THE testator, *Benjamin Devaynes*, died in 1809.

By his will, he directed his just debts to be paid, and he charged and made liable all his real and personal estate therewith. He devised two warehouses in *Liverpool* to trustees, in trust for his son *William Devaynes*, of *Jersey*, for life, with remainder as he should by will appoint.

*William Devaynes*, of *Jersey*, died in 1841. By his will he "directed that all his debts, funeral expenses, and the charges of proving his will, should be paid as soon as conveniently might be after his decease." And after referring to his power of appointment, he devised and appointed all his real and personal estate, which he had power to dispose of, to *Forshaw* and *Girvin*, and their heirs, &c., upon trust, that they should "as soon as might be after his decease, absolutely make sale and dispose of all and every part thereof, which might be of a saleable description, either together or in parcels, and by public auction or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, for such price or prices, and

Where a loss occasioned by a breach of trust does not happen until after the death of the trustee, his assets are equally liable.

Two deceased trustees having committed a breach of trust by mortgaging, instead of selling the testator's real estate, and accounts of the estate being necessary, it was held that, notwithstanding the 32nd General Order of *August*, 1841, a suit could not be maintained to charge the estate of one trustee, and take the accounts, in the absence of the representative of the other.

and payable at such time or times, as they," &c., "should think to be the most money and best payment that could, at the time or times of such sale or sales taking place, be reasonably had or gotten for the same; and in case of exposing the same to public auction, and a fair and reasonable price should not, in the opinion of his trustees," &c., "be bidden for the same, then to buy in the same; and again, from time to time, to try and sell the same by auction or private contract, as might appear to him or them to be the most beneficial."

1857.

DEVAYNES  
v.  
ROBINSON.

He gave several legacies, amounting to about 3,950*l.*, and amongst them, one of 2,000*l.* to the widow of *William Devaynes*, of *Liverpool*, for life, and afterwards to the latter's children. And he directed that all the legacies should become vested immediately on his decease, and become payable, with interest, so soon as his said estate and premises should have been sold, and the money for the same realized. He gave his general residue in like manner, to the widow of *William Devaynes*, of *Liverpool*, for life, with remainder to his children.

*Forshaw* and *Girvin* proved the will, but instead of selling the real estate devised by *Benjamin Devaynes's* will (consisting of the two warehouses at *Liverpool*), they, on the 18th of *May*, 1841, mortgaged it to *Robinson* for 2,500*l.* The mortgage recited the will of *Benjamin Devaynes*, and that *Forshaw* and *Girvin* had been duly appointed trustees of *Benjamin Devaynes's* will, and that all property, subject to the trusts thereof, had become vested in them. It also recited the will of *William Devaynes*, of *Jersey*, and that *Forshaw* and *Girvin* had occasion to borrow the sum of 2,500*l.* for the purposes of the estate of *William Devaynes*, of *Jersey*.

There

1857.  
DEVAYNES  
v.  
ROBINSON.

There were nine children of *William Devaynes, of Liverpool*, and six had, in 1841, attained twenty-one. By indenture of the 17th of *June*, 1841, after reciting the two wills, the deaths of the testators, and that "for the purpose of raising a fund for payment of the debts and legacies of *W. Devaynes, of Jersey*," the trustees had mortgaged the two warehouses for 2,500*l.*, and that the widow and six adult children had requested payment of their shares of the residue, which the trustees had agreed to make, upon their covenant of indemnity; and that the widow and the six adult children had requested the trustees to refrain from selling the warehouses, and to allow the rents to be received by them, *it was witnessed*, that the widow and six children covenanted to indemnify the trustees against all actions, &c., by reason of the non-payment of the mortgage debt, or any other liability of the testator; and further, that the infant children, when of age, would ratify the arrangement, and in default, that they would indemnify the trustees against all actions, &c., on account of their retaining the premises, instead of selling the same, according to the trusts of the testator's will.

The warehouses were retained, and had in fact never been sold.

The three children, who had not executed the deed of indemnity, instituted this suit, in the year 1854, against *Robinson*, the mortgagee, the representative of *Girvin*, and the six other children, alleging that a great loss had been occasioned, by reason of the real estate not having been sold, and that the mortgage to *Robinson* was invalid, and a breach of trust. It prayed that the accounts might be taken, that the assets of the trustees might be made liable for what might be found due from them, and in respect of "any loss sustained from their delay in selling the  
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the real estate." Secondly, that the mortgage to *Robinson* might be declared invalid and cancelled.

1857.  
DEVAYNES  
v.  
ROBINSON.

To prove the depreciation of the property, one of the Plaintiffs' witnesses, a surveyor, stated, that the warehouses were worth 5,100*l.* in 1841, but only 3,100*l.* at the present time.

Mr. *Follett* and Mr. *Amphlett*, for the Plaintiffs. The trustees were not justified in mortgaging the estate, instead of following the distinct directions to sell; *Stroughill v. Anstey* (a); *Page v. Cooper* (b); *Haldenby v. Spofforth* (c). It was a breach of trust, of which *Robinson* had notice, both through his solicitor, and from his own mortgage deed. He cannot, therefore, stand in a better situation than the trustees. There has been no acquiescence on the part of the Plaintiffs, and no delay sufficient to disentitle them to relief, for their mother did not die until 1849.

Mr. *Wiglesworth* for parties in the same interest.

Mr. *R. Palmer* and Mr. *C. Hall*, for *Robinson*.

*Forshaw* and *Girvin* were trustees and executors of the wills both of *Benjamin Devaynes* and *William Devaynes of Jersey*. The will of *Benjamin* charged his real estate with his debts, and this of itself justified them in raising the 2,500*l.* by mortgage. *William Devaynes's* will also charged his real estate with his debts, and this again authorized them to mortgage, and this power was not superseded by the subsequent direction to sell. They had a discretion, which they exercised wisely, and for the benefit of the parties interested; besides which, *William* had no power of detracting from the power of mortgaging

(a) 1 *De G., M. & G.* 635.  
(b) 16 *Beav.* 396.

(c) 1 *Beav.* 390.

1857.

DEVAYNES

v.

ROBINSON.

mortgaging contained in *Benjamin's* will, under which he took the warehouses.

*Stroughill v. Anstey* (a); *Wrigley v. Sykes* (b); *Ball v. Harris* (c); *Shaw v. Borrer* (d); *Robinson v. Lowater* (e); *Eidsforth v. Armstead* (f); *Colyer v. Finch* (g).

The mortgagee has a right to stand in the place of the legatees, who have been paid out of his money, and the legacies amounted to 3,950*l.*, which is ample to cover his 2,500*l.* Besides this, he has the covenant of the borrowers, and a charge on the interests of the six children who executed the deed of indemnity, the mortgagee therefore is, at all events, safe.

Mr. *Lloyd* and Mr. *Little*, for the representative of *Girvin*. The terms of the will gave a discretion to the trustees, and under the circumstances they were justified both in postponing the sale, and raising the necessary funds by mortgage, in order to prevent a sacrifice of the property; they acted *bonâ fide* on the opinion of Counsel. Is it to be said, that trustees, with a degree of perverse impetuosity, are to sell at once, under all circumstances, and without regard to the real interests of their *cestuis que trust*? The loss, if any, has occurred from the accidental circumstance of the depreciation of property in *Liverpool*, and not from any imprudent act of the trustees.

*Girvin* has been dead ten years; his assets are only liable for the amount of the depreciation which took place in

(a) 1 *De G., M. & G.* 646.(b) 21 *Beav.* 337.(c) 4 *Myl. & Cr.* 268.(d) 1 *Keen*, 559.(e) 17 *Beav.* 592.(f) 2 *Kay & J.* 338.(g) 5 *H. L. Cas.* 905; 19 *Beav.* 500.

in his lifetime; *Buxton v. Buxton* (a); *Morgan v. Morgan* (b).

1857.

DEVAYNES  
v.  
ROBINSON.

[*The MASTER of the ROLLS* referred to *Hughes v. Empson* (c).]

The parties who have sanctioned the course of the trustees, are bound to indemnify them; *Raby v. Ridehalgh* (d).

*The MASTER of the ROLLS* (without hearing the reply) said,

I think the Plaintiffs are entitled to the decree which I am about to state.

The first question is, whether the executors, under the will of *William Devaynes*, of *Jersey*, were justified in mortgaging the property; and, if not, whether the mortgage can be supported as a proceeding under the will of *Benjamin Devaynes*? I am of opinion, that under the will of *William Devaynes*, of *Jersey*, this mortgage cannot be supported as a proper execution of the trusts reposed in them. The case of *Stroughill v. Anstey* (e), and the cases there referred to, establish this:—"As a general rule, there can be no difficulty in saying, that a mortgage under a mere trust for conversion, out and out, is not a due execution of that trust."

Upon referring to the terms of this will, I am of opinion, that this was a trust for conversion out and out, and that, consequently, as a general rule, a mortgage

(a) 1 *Myl. & Cr.* 80.

(b) 14 *Beav.* 72.

(c) 22 *Beav.* 181.

(d) 7 *De G., M. & G.* 104.

(e) 1 *De G., M. & G.* 635.



1857.  
DEVAYNES  
v.  
ROBINSON.

mortgage is not a good execution of that trust. Then, the question is, whether the executors can support it, (though the general rule be against them,) on the ground, that there were such peculiar circumstances in this case, as made it absolutely necessary and imperative upon them to obtain money forthwith, for the purposes and for the exigencies of this estate, and not to proceed to sell. I express no opinion whether such an excuse would be admissible; but this is clear, that if it be, the burden of proof, to establish that case, lies upon the executors, and they have not established any such case.

If the exigencies of the estate required, positively, that any sum should be paid, and that, without the money being raised immediately, there would have been considerable losses sustained, that ought to be proved by the executors, in order to justify the mortgage which they raised. There are, in their account, sums paid on behalf of legacies, these clearly constitute no justification, and there is nothing to shew me, that the estate, independently of the sum raised by this mortgage, would not have satisfied all the exigencies which then existed.

That being so, the next question is, whether this can be supported as a proceeding under the will of *Benjamin Devaynes*? I am of opinion it cannot. In the first place, it was not, in fact, a proceeding under that will, nor was it so treated by any of the persons concerned in it. I look at the deed for the purpose of ascertaining what the object of the parties to it was; and I find that it was not so treated by any of them. It is of some importance to bear in mind the dates, in this transaction. *Benjamin Devaynes* died in 1809, and this transaction takes place in 1841, a period of more than thirty-one years after his death. It would  
be

be a singular proceeding, thirty-one years after the death of a testator, to sell his property under a general charge for the purpose of paying his debts. It would require some species of explanation, and a person advancing money on mortgage would naturally ask executors or trustees, why they had not raised it before, and how it happened, that there were debts of the testator which required a mortgage of his estate thirty-one years after his death. It would certainly be a circumstance very much calculated to set him on inquiry in such a matter.

1857.  
DEVAYNES  
v.  
ROBINSON.

But the strong circumstance in this case is this:—that the deed, after reciting the whole of the title, contains an explanatory recital, which is the key to the intention of the parties and to the object of the deed; it states, that “whereas *James Anderton Forshaw* and *James Girvin* having occasion to borrow the sum of 2,500*l.* for the purposes of the estate of the said *William Devaynes deceased*, have requested the said *Thomas Robinson* to advance and lend them the same, which he, the said *Thomas Robinson*, hath consented and agreed to do.” That is, the 2,500*l.* was advanced “for the purpose of the estate of *William Devaynes*.” Suppose a sum of money had been raised under the will of *Benjamin Devaynes*, to the application of which a purchaser would be required to see, could *Mr. Robinson*, under this mortgage deed, have been fixed, because it had not been properly applied under a will thirty years before, under which the estate was mortgaged?

The appointment of the executors of *William* as new trustees of *Benjamin's* will was evidently only done to avoid any difficulty about the legal estate. It was for the purpose of avoiding any expense or difficulty in that respect that *William Devaynes*, of *Jersey*, within a fortnight

1857.  
DEVAYNES  
v.  
ROBINSON.

fortnight or three weeks after he had made his will, gets the very gentlemen whom he had appointed his executors to be the new trustees under the will of his father. Then, on his death, about four years afterwards, these gentlemen, acting under his will, proceeded to raise money, not for the purpose of *Benjamin Devaynes's* estate, but, as they themselves expressly state, "for the purpose of the estate of *William Devaynes*." The question then is, whether they have duly raised that sum for the purpose which they stated, namely, that of the estate of *William Devaynes*? I am of opinion that the proceeding cannot be supported under the will of *Benjamin Devaynes*, and that it cannot be supported as a proceeding justified by the trusts reposed in them by the testator *William Devaynes*, of *Jersey*.

That being so, I must declare that this is not binding as against the Plaintiffs. The other children have bound themselves by a deed of indemnity, which makes this, so far as they are concerned, a valid transaction.

The next question is, whether the executors have exercised a proper discretion in not selling this property. Here is a trust to sell immediately; there is a discretion given to them not to sell it at what they may consider a loss, and a discretion to buy it in, and from time to time, to put it up again to auction for that purpose. I am of opinion that there is a discretion reposed in them to suspend, for a reasonable time, the sale of this estate; but for what period of time is that to continue? It is incumbent upon them to shew they have taken steps for the purpose of endeavouring to carry into effect that trust. I have not before me any evidence to shew that such was the view they adopted; but the evidence is wholly silent upon that subject. On the contrary, the mere fact of making this mortgage shews an intention very much in the opposite way, because  
nothing

nothing could be so improvident as to incur the expense of a mortgage, if they were about to sell the property, and pay off the mortgage immediately afterwards; the expense of such a proceeding would be considerable, and the whole of it would fall upon the *cestuis que trust*. It necessarily follows, that in my opinion, the evidence before me establishes, not only that they did not endeavour to execute this trust, and that they did not suspend it by reason of their thinking that further time would be desirable for that purpose, but that it was not their intention to execute it at that time. This goes on for a period of five years, or something exceeding five years in one case, and a little less than five years in the other case, no step whatever being taken to sell this property.

1857.  
DEVAYNES  
v.  
ROBINSON.

It is said, that it appears, incidentally,<sup>4</sup> that the value of the property, up to the death of Mr. *Girvin*, was as large as the price at which it would have sold in 1841, for that even in the year 1846, it was worth 5,400*l*. That appears to me, I must say, unfavourable to the view of the trustees. Why did they not exercise the trusts, and sell it during that period? I cannot accede to the view, that if a trustee commit a breach of trust, and the consequences of it do not occur until after his death, his estate is not to be made liable, because, if redress had been sought in respect of that breach of trust, it was reparable during his lifetime. It is admitted that such would be the rule with respect to an active breach of trust, as if a trustee did an act by which he placed the trust money in an improper investment: even although the loss might not have been sustained during his lifetime, still, if the consequences of that act were a total loss after his death, his estate would be then liable. I have spoken of the commission of a breach of trust, which involves activity,  
whereas

1857.

DEVAYNES  
v.  
ROBINSON.

whereas here, the breach of trust arises from the want of doing some act, but if the breach of trust arises from the trustee doing no act at all, it would equally be one for which his estate would be liable to make good the loss thereby occasioned. I suggested, as an instance, the case of a simple contract debt being due to the testator, which the executor and trustee had not realized or got in for a period of five years after the testator's death, during the whole of which time the debtor was solvent and might have paid. If immediately or shortly after the death of the trustee the debtor had become insolvent, the estate of the trustee would still be liable in respect of his wilful default, for not having got in that sum of money which it was his duty to obtain. I do not rest the case on any doctrine peculiarly applicable to wilful default, but on this: that it was part of the duty which the trustee or executor had undertaken to perform, and that he was bound to perform every part of the trust which he had undertaken.

In this case, nothing was done towards the performance of that which was the first duty to be performed:—the sale of this estate. No steps were taken for that purpose, except that it was put up for sale on one occasion in 1849, at which the highest bidding was 3,100*l*. But that was done after the death of the trustees, and so far as the trustees themselves are concerned, no step whatever was taken by them for the purpose of realizing the estate according to the trust which they had to perform, down to the year of 1846. Upon this state of the case, it appears to me that a trust was reposed in them, and assuming there was also a discretion reposed in them, they have neither performed the trust nor exercised the discretion, but have done something which they were not authorized to do.

I must

I must therefore direct an inquiry to ascertain whether any loss has been sustained by reason of the trustees not having executed the trust for the sale of the property during their lives; when the case comes back, I can deal with it as I may think proper. I do not think I can direct any inquiry now as between co-Defendants.

1857.  
DEVAYNES  
v.  
ROBINSON.

Declare, so far as regards Plaintiffs, that the mortgage is not binding, and direct a sale of the estate, free from the mortgage.

Mr. *R. Palmer*. The Court will also declare, that the mortgagee is entitled to stand as a creditor against the purchase-money, for so much of his mortgage-money as was properly applied in administration.

*The MASTER of the ROLLS*. Yes, he is entitled to that.

The cause had previously come on for hearing on the 25th of *June*, 1856, when an objection for want of parties was raised by the Defendants, on the ground that no personal representative of *Forshaw* was before the Court, no administration having been granted of his estate.

1856.  
*June 25.*

Mr. *Follett*, in answer to the objection, argued, that this was a joint and several liability, and that the case came within the 32nd Order of *August*, 1841 (*a*), and as he asked no decree against the estate of *Forshaw*, and as there was no right to contribution as between *tortfeasors*, the objection was untenable.

*The*

(*a*) *Ord. Can.* 174.

1856.  
  
 DEVAYNES  
 v.  
 ROBINSON.

The MASTER of the ROLLS said, that if the representatives of *Girvin* (who were entitled to contribution as against the representative of *Forshaw*) raised the objection, the cause could not proceed, and that on the present record the accounts could not be taken in their absence. But if it had been proved that *Forshaw* had died insolvent, and that nothing could be obtained from his estate, it might not be necessary to have his representatives present. He added, that although he did not intend to express any decided opinion on this point, yet that he doubted whether an administration *ad litem* would be sufficient.

1857.  
 April 23.

A representative *ad litem* was made a Defendant, and, during the present hearing,

Mr. Lloyd, Mr. Little, Mr. R. Palmer and Mr. C. Hall, again objected to the suit for want of parties. They said that *Forshaw* was only represented by a Defendant who had obtained limited letters of administration *for the purposes of this suit*, whereas a full representative was necessary; and that administration *ad litem* was insufficient in such a case as this, the object of which was to impose a liability and to administer the estate. That if the mortgage were set aside, *Robinson* would be entitled to be recouped out of the estate to the extent to which his mortgage-money had been properly applied, and to have the benefit of *Forshaw's* covenants. They cited *Davis v. Chanter* (a); *Robinson v. Bell* (b).

Mr. Follett, *contra*, said that the Ecclesiastical Court would not grant any other administration, except to the next of kin or a creditor.

*The*

(a) 2 Phil. 545.

(b) 1 De G. & Sm. 630.

*The MASTER of the ROLLS.*—On that statement, and all the *cestuis que trust* and the party having the legal estate, being before the Court, I must direct the cause to proceed.

1857.  
DEVAYNES  
v.  
ROBINSON.

NOTE on the 32nd General Order of August, 1841 (a).

Prior to this Order, all parties jointly and severally liable were necessary parties; *Madox v. Jackson*, 3 *Atk.* 406; *Bland v. Winter*, 1 *Simons & S.* 246. Previous also to this order, all trustees implicated in a breach of trust were necessary parties, notwithstanding what is said in *Walker v. Symonds*, 3 *Swans.* p. 75, which case, "as explained by *Munch v. Cockerell*, 8 *Sim.* 231, shews, that all trustees are *primæ facie* necessary parties to a suit complaining of a breach of trust, though execution might be taken out against one only;" *Shipton v. Rawlins*, 4 *Hare*, 619; and see *Perry v. Knott*, 4 *Beav.* 179, the note to 6 *Law J. (Ch.)* 13; and *Attorney-General v. The Corporation of Newbury*, 1 *C. P. Cooper (temp. Coll.)* 373. But since the 31st Order, it has been decided, that it applies to a case where a breach of trust has been committed by several trustees, in which case the *cestui que trust* may proceed against one trustee in the absence of the other; *Perry v. Knott*, 5 *Beav.* 293; *Kellaway v. Johnson*, *Ibid.* 319; *Attorney-General v. The Corporation of Leicester*, 7 *Beav.* 176; *Strong v. Strong*, 18 *Beav.* 408; *Attorney-General v. Pearson*, 2 *Collyer*, 581. The practitioner must not, however, assume, from these authorities, that in a suit to repair a breach of trust, in which the trust property will be brought back to be administered by the trustees, whose functions have not ceased, the absence of any of the trustees can be dispensed with. In a suit to make trustees liable for a breach of trust, it was held, that assignees of a bankrupt trustee were not indispensable parties; *Norris v. Wright*, 14 *Beav.* 291. But in *Fowler v. Reynal*, 2 *De G. & Sm.* 749, the other trustees were held necessary parties. So in *Shipton v. Rawlins*, 4 *Hare*, 619, in a suit to repair a breach of trust, where the tenant for life was also a trustee, and her assets might be liable, it was held, that her representative was a necessary party to the suit. So *cestuis que trust*, who concur in a breach of trust, are, notwithstanding this Order, necessary parties to a suit by one trustee against another for contribution in respect of a breach of trust; *Jesse v. Bennett*, 6 *De G., M. & G.* 609. If, also, the breach of trust involves also the general administration, the 32nd Order does not apply; *Chancellor v. Morecraft*, 11 *Beav.* 262; nor does it apply to an administration suit; *Biggs v. Penn*, 4 *Hare*, 469; *Hall v. Austin*, 2 *Colly.* 570; or to a suit for a legacy; *Penny v. Penny*, 9 *Hare*, 39. It applies to a demand on a joint and several promissory note; *M'Intyre v. Connell*, 1 *Sim. (N.S.)* 225; but not to cases of principal and surety; *Allan v. Houlden*, 6 *Beav.* 148; *Lloyd v. Smith*, 13 *Sim.* 457.

The Order has been held not to apply to a case abated prior to its promulgation; *Bampton v. Birchall*, 5 *Beav.* 330; but it was held to apply to a suit ordered to stand over prior to the Order; *Perry v. Knott*, 5 *Beav.* 293. Where the Plaintiff has framed his record making two persons liable, he cannot alter it and proceed against one, by waiving relief against the other at the hearing; *The London Gas Light Company v. Spottiswoode*, 14 *Beav.* 264; *Fussell v. Elwin*, 7 *Hare*, 29.

(a) *Ord. Can.* 174.





1857.

## MEIKLAN v. CAMPBELL.

Feb. 17.

A Scotchman died in *London* possessing large real and personal estate in *Scotland*, and a comparatively very small personal estate in *England*. The Plaintiff, resident in *Scotland*, filed a bill against the four trustees, three of whom resided in *Scotland*, to administer the real and personal estate, and obtained an order, under the 33rd Order of *May*, 1845, to serve the three trustees in *Scotland*. A motion to discharge that order was refused, it not being the proper time to raise the question, and there being a case for the exercise of the jurisdiction of this Court.

**JAMES MEIKLAN**, of *Carnbroe*, in the county of *Lanark*, in *Scotland*, died in *London*, on the 13th of *October*, 1854, having made his will in the Scotch form, whereby he appointed the Defendants, *R. D. Campbell*, *A. S. Finlay*, *M. Campbell*, and his widow *Christiana A. Meiklan*, trustees. Confirmation was granted to them on the 11th of *January*, 1855, and it was recorded in the Commissary Court at *Edinburgh*. The will was proved in the Prerogative Court of *Canterbury*, on the 30th of *November*, 1854, by *M. Campbell* alone.

This suit was instituted by the testator's son, who was resident at *Holyrood*, for the administration of the real and personal estate, against the four trustees, all of whom, except *Christiana A. Meiklan*, were resident in *Scotland*, and three beneficiaries were in *England*.

On the 24th of *January*, 1857, an order was made, under the 33rd Order of *May*, 1845 (a), giving liberty to serve the bill on the three trustees in *Scotland*.

The three trustees now moved to discharge the order. In support of the application, affidavits were filed, to shew that the testator was domiciled in *Scotland* (which was a fact contested by the bill), and that immediately before his death, he had requested to be interred there.

That

(a) Ord. Can. 297.

That his property consisted of real estate in *Scotland* producing 7,396*l.* a year, a heritable bond of 20,000*l.*, and personal estate of the value of 9,000*l.*; while his property in *England* (which was all personalty) was under the value of 5,000*l.*, being 1,395*l.* in the hands of his solicitor, 1,187*l.* the value of his racing stud, and 405*l.* the value of house furniture, and a reversionary interest in a leasehold. His debts, which had been all paid, exceeded 15,500*l.*

1857.  
  
 MEIKLAN  
 v.  
 CAMPBELL.

There was no suit existing in *Scotland* as to these matters.

Mr. *Lloyd* and Mr. *C. C. Barber*, in support of the motion. The power conferred by the 33rd Order (a) was given to prevent the failure of justice, and not to give to this Court jurisdiction over matters which ought properly to be determined by the tribunals of foreign countries. The Order is permissive only, not obligatory: the Court "may order." It is, therefore, incumbent on the Court, in every case, to see that the circumstances justify the Order, and it must be satisfied that justice will be better done here than in the country in which the Defendants are resident. Sir *James Wigram* says, "this Order does not give the Plaintiff a right to call upon the Court, in all cases, to order service of the *subpœna* abroad; but it gives the Court power to do so, in exercise of a sound discretion according to the circumstances of the case;" *Whitmore v. Ryan* (b).

Here the circumstances are plainly such as to shew, that this is not the proper *forum* for determining the questions raised by the bill as to the domicil of the testator,

(a) *Ord. Can.* 297.

(b) 4 *Hare*, 617.

1857.  
  
 MERKLAN  
 v.  
 CAMPBELL.

testator, and the effect of his Scotch will, or for administering his estate. The Plaintiff and three trustees are all in *Scotland*, the property is in *Scotland*; with one small exception, the personal estate has been all exhausted in the payment of the debts, and there remains a large real estate, so that the suit becomes one for the administration of the Scotch real estate, as to which all the authorities concur, that *Scotland* is the proper *forum* to determine all questions regarding it. When persons are resident in a foreign country, they are answerable only to the courts there, which are the proper tribunals; and it would produce great injustice to compel persons permanently resident in *Scotland* to come from *Scotland* to this country to have such matters determined. The accounts passed here would afford no protection.

It would be more convenient to administer the estate in *Scotland*, where there are peculiar modes of doing so, and where a peculiar law and practice are applicable. Thus, a *quorum*, consisting of the major part of the trustees, may act without the concurrence of the others; they receive no money, but the assets are got in and applied by a *factor*, and they may be called upon to account *de anno in annum*. Besides this, there are questions of Scotch law, which will be more conveniently determined by Scotch judges, conversant with the Scotch law, than by an English judge, aided by the conflicting opinions of Scotch advocates. If the small shred of personal estate which is in *England* gives jurisdiction to this Court, then, in the converse case, the real and personal estate of any English nobleman or foreigner who happened to die possessed of small personal estate in *Scotland*, might be administered in *Edinburgh*.

This is not a proper case to bring here, but it ought  
 to

to be left to its legitimate and natural tribunal in *Scotland*, and the Order ought, therefore, to be discharged.

1857.

MEIKLAN  
v.  
CAMPBELL.

Mr. *R. Palmer*, Mr. *Selwyn*, and Mr. *Rogers* were not heard.

*The MASTER of the ROLLS.*

Feb. 17.

I am of opinion that this is not the proper time for raising this question, but if it were, then, upon the affidavits which have been stated to me, there is a case made out for an administration under the jurisdiction of this Court. It would be a singularly inconvenient course, upon an application involving the question, whether a person had been properly served with a *subpoena*, which this Court has given leave to be served, to raise the point of whether the Court here can more conveniently administer justice, with respect to the whole or a portion of the property, instead of waiting until the party has appeared, and has moved the Court, for the purpose of satisfactorily disposing of that question. But upon the facts here detailed (assuming that this Court has jurisdiction now to dispose of this point), I am of opinion that this Court may properly entertain the questions raised in this bill. Here is a gentleman who had property in *England*, not to a very large extent, and although not domiciled here, he was resident in *England* for a portion of the year at least, and it is, therefore, to be assumed, or at any rate it is probable, that he contracted some debts in *England*. Are those to be allowed to remain unpaid? This Court may very satisfactorily dispose of those debts, and prevent any claims from hereafter arising against any one interested in the estate, by some administration in this Court.

It is stated, that the more important question, which  
I assume

1857.  
MEIKLAN  
v.  
CAMPBELL.

I assume to be one which must be disposed of according to the Scotch law, will be more satisfactorily disposed of in the Scotch courts. But what is there to prevent this Court, in the administration of this estate, from adopting any proceedings in any Scotch courts, or any accounts taken there? It is done frequently; I have had occasion to do it on various occasions, and in such cases, the Court feels no difficulty in adopting the proceedings taken in a court in a foreign country, which has competent jurisdiction to determine between the parties.

In this case the parties are bound to appear, and I am of opinion, that the circumstance of this being a will proved in this country, of there being property in this country, and of the testator having been resident in this country (though it is not necessary to have all those circumstances combined), make it impossible for this Court, in the exercise of a sound discretion, to say, that the eldest son, who is entitled at all events to a considerable portion of this estate, is not entitled to the assistance of this Court, for the purpose of clearing the estate, so far as the jurisdiction of this Court can do it. I am of opinion, therefore, that this motion must be refused.

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NOTE.—See *Innes v. Mitchell*, *Lords Just.*, 7 July, 1857.

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1857.

PAYLOR v. PEGG.

March 16, 17,  
18.

THE testator, by his will, dated in 1805, expressed his wishes in the following terms:—

“First I will and require that all my just Debts and Funeral Expenses and the proving of this my Will shall be first paid and discharged. I give and devise unto my dear and loving Wife *Jane* and my faithful and trusty Friend *Robert Inchboard* their Heirs Executors Administrators and Assigns In Trust for my Son *John* until he attain his age of twenty-one Years or until he be able to make a Will himself All my Estate Lands and Grounds Houses and Buildings with their and every of their Appurtenances to the same belonging situate at *Low Dunsforth* or elsewhere in the County of *York* Also I give and bequeath unto my said loving Wife *Jane* so much of my household Furniture (including a Bed and all the Bedding thereunto belonging) as will furnish a Room well I also give and bequeath unto my said loving Wife the sum of twenty Pounds a Year so long as she shall continue my Widow if my Son be living and if my Son should happen to die before he attain his age of twenty-one Years then in that case I do hereby empower my said Wife *Jane* to hold my whole Estate during her natural life if she continues my Widow but if my said loving Wife shall happen to intermarry then I give unto her only ten pounds a year during her natural life if my Son be then living *Likewise* I do hereby empower my Brother *John Foster* and my Brother in law *John Rook* at the decease of my said loving wife *Jane* to sell all my Estates both real and personal and out of the Money they may obtain for the same Estates I do hereby

order

A devise, commencing with the word “Likewise,” held to be subject to the contingency mentioned in the preceding gifts of the same estate.

A testator devised an estate to his son until he attained twenty-one, and to the testator's widow for life, in case his son died under twenty-one. This was followed by a gift of the produce of the estate to his nephews, which commenced with the word “Likewise.” Held, upon the context, that the gift to the nephews was governed by the same contingency as that to the widow, and the son having attained twenty-one, that the gift to the nephews failed.

1857.  
  
 PAYLOR  
 v.  
 PEGG.

order and direct my said Brothers to pay unto my said loving Wife *Jane* her Executors Administrators and Assigns the sum of three Hundred Pounds Also I give unto my said Brothers for the trouble they may have in the Sale of my Estate each the sum of twenty Pounds and the residue and remainder to go equally amongst my Nephews and Nieces then living And I do appoint my said dear Wife *Jane* and my trusty Friend *Robert Inchboard* joint Executrix and Executor of this my last Will and Testament until my son come of age."

The testator died in 1809; his son *John* attained twenty-one in 1823, and was let into possession. The testator's widow died in 1841, and the testator's son *John* died in 1856, having devised the estate to the Defendant, Mrs. *Pegg*.

The Plaintiffs, a nephew and niece of the testator, living at the decease of the testator's widow, insisted, by this bill, that on the death of the testator's widow in 1841, the estate ought to have been sold, and that the proceeds, after payment of the three legacies, to have been distributed amongst the testator's nephews and nieces then living.

Mr. *R. Palmer* and Mr. *John Pearson* for the Plaintiffs. It will be argued that the son was absolutely entitled under the will, but it contains no gift to the son beyond this "until he attains his age of twenty-one years, or until he is able to make a will himself;" therefore, when he attained twenty-one his estate ceased. The testator seems to have thought that his son might make a will before he attained twenty-one. There is an express direction to two other persons to sell the real and personal estate after the death of the wife;  
 and

and after payment of three legacies, there is a distinct gift of the residue amongst the nephews and nieces then living. The direction to sell is absolute and unqualified, for the word "Likewise," at the commencement, makes it a new sentence, which is separated from and made independent of the contingency in the previous parts of the will.

1857.

PAYLOR  
v.  
PUGH.

In *Boosey v. Gardner* (a), a testatrix bequeathed the interest of Long Annuities to her sisters, and in case one or both of their deaths before hers, gave "the whole of interest in Long Annuities" to her brother for life. At his death, half of the interest she gave to a daughter of the brother till she attained twenty-one, and "then to receive half the capital." *Likewise* the testatrix bequeathed to a son of her brother the other half. It was held, by the *Lords Justices*, that, on the construction of the whole will, the bequests to the niece and nephew were not contingent upon the sister's death in the testatrix's lifetime.

The word "likewise" is similar to "*item*," which is the usual word in a will to introduce new and distinct matter; therefore a clause, thus introduced, is not influenced by, nor ought it to influence, a preceding or subsequent sentence, unless it be, of itself, imperfect and insensible without that reference; *Hopewell v. Ackland* (b). They also referred to *Fenny d. Collings v. Ewestace* (c).

Mr. Selwyn and Mr. Hobhouse for a mortgagee of the devisee of the son. It is said that the power of sale is unconditional and absolute on the death of the widow.

(a) 18 *Beav.* 471; reversed 5  
*De G., M. & G.* 122.

(b) 1 *Salk.* 239.  
(c) 4 *Maule & S.* 58.



1857.

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 PAYLOR  
 v.  
 PEOG.

widow. This is not so, for if the widow had died during the minority of the son, the sale could not have taken place.

The words "but if my said loving wife shall happen to intermarry, then I give unto her only ten pounds a year during her natural life, if my son be then living," should be put in a parenthesis, and transferred to and made to follow the sentence giving her 20*l.* a year during her widowhood "if my son be living." The will should then be read thus:—And if my son die under twenty-one, my wife to hold my estate for life, likewise (*viz.*, in the event of the death of his son under twenty-one) the property shall be sold and divided amongst my nephews and nieces.

The son having attained twenty-one, the power of sale never arose, and the son took the estate either by implication or by descent as undisposed of. The whole series of limitations depend on the event of the son's dying under twenty-one.

Mr. *Cole*, for the devisees of the son, argued, that it was impossible to conceive that the testator intended to prefer his nephews to his son, for whom he had made a provision until twenty-one.

He cited *Jarman* on Wills (*a*); *Davis v. Norton* (*b*); *Cuttley v. Vincent* (*c*).

Mr. *Pearson*, in reply, stated, that the original will contained no stops, and that the word "Likewise" began with a capital letter.

*The MASTER of the ROLLS* reserved his judgment.

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(*a*) Vol. 1, 706 (2nd edit.)  
 (*b*) 2 *P. Wms.* 390.

(*c*) 15 *Beav.* 198.

*The MASTER of the ROLLS.*

I think that the true construction of this will is, that the son is entitled to the estates. My own impression on the will is, that the testator did not mean to dispose of the estates in the event that took place, but that he meant them to descend to the son, as the heir at law. I entertain no doubt, but that the contingency upon which the testator, by his will, directs that the wife should be entitled to a life estate, extends also to the direction to sell. The contingency upon which the wife is entitled to the life estate is this:—"If my son should happen to die before he attains his age of twenty-one years." The difficulty is occasioned by this; that there are two lines interpolated, which certainly do not belong to the sentence; and which seem to have been misplaced. I concur in the arguments of Counsel, that they have no meaning there, except as an apparent introduction by the testator, of something which he had forgotten to introduce in the proper place, as if he had said "by the bye," or "by the way," which would be the ordinary mode, in common conversation, of expressing what had not been introduced in its proper place.

If you read the will in this form:—"I give and bequeath to my wife the sum of 20*l.* a year, so long as she shall be my widow, if my son be living, but if my wife shall happen to intermarry, then I give her only 10*l.* a year during her natural life, if my son be living," it is clear, that these are two branches of the same sentence, and relate to the same thing.

So also, it is quite clear, if the other parts are read continuously, that they are two branches of the same gift, and relate to the same subject. It would run thus:—"And if my son should happen to die before he  
attains

1857.



PAYLOR

v.

PEGG.

March 17.

1857.

  
PAYLOR  
v.  
PAGO.

attains his age of twenty-one years, then, in that case, I do hereby empower my wife to hold my whole estate during her natural life, if she continues my widow. Likewise, I do hereby empower my trustees, at the decease of my wife, to sell my estates, both real and personal," and out of the money I direct them to pay two legacies, and the residue "to go amongst my nephews and nieces." It is obvious that if you read it in that way, the contingency, with respect to the wife's life estate, governs also the direction to sell. There is no difficulty at all in construing the will in that form, but the difficulty is occasioned by the relative position of the same sentences. It is obvious, therefore, in my opinion, that there was no confusion in the testator's mind, but a considerable confusion with respect to the collocation of the different branches of the bequests which he makes. However, the right and proper construction is that which I have stated.

There are various little matters which confirm this. In the first place, there is an expressed object to benefit the son, and that it should be in trust for him until he attains the age of twenty-one years, or be able to make a will for himself, that is, until he has a power of disposing of it. The testator had some vague notion, arising possibly from the old law with regard to personal estate, that an infant could make a will before he came of age. Then the direction to sell at the death of the wife, obviously does not provide for the case (as was pointed out very clearly by Counsel) of the wife dying during the infancy of the son, because it is evident that he did not anticipate a sale of the reversion, which would necessarily be the case, the son being entitled, at all events, to hold it until he attained the age of twenty-one years. Again, it is impossible to understand why the testator should have given the property to his son  
until

until he was twenty-one, and then take it all away from him, and give it to his nephews.

1857.

PAYLOR  
v.  
Pegg.

My principal reason for wishing to look into the authorities on the subject, was with relation to the case which was cited of *Boosey v. Gardner* (a), in which it is said the *Lords Justices* have laid down, that where the word "*likewise*" began the sentence, it constituted a separate and independent gift, which was not to be connected at all with that which preceded. It may be, that their opinion may bear that construction, but I think it is only to be taken with reference to that particular will, and that they did not intend to lay that down as the general law or as a general rule. In that particular case, I did not think that to be the proper construction (b); their Lordships thought otherwise, but I feel satisfied, that it was not their intention to establish this proposition:—that wherever the word "*likewise*" occurs, the contingency which governs the previous gift is not to govern that which follows, if the subject-matter is clearly connected, as, for instance, where one part is dealing with a life estate, and the other with the reversion.

I am of opinion, therefore, that the son became entitled to this property upon the death of his father.

Having regard to the length of time that has elapsed, and to my opinion upon the construction of the will itself, I think I ought to dismiss this bill with costs.

(a) 5 De G., M. & G. 122.

(b) 18 Beav. 471.

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NOTE.—See also *Abbott v. Middleton*, 21 Beav. 143.

1857.

## LAING v. COWAN.

March 21.

A married woman died in 1849 possessed of savings of her separate estate, amounting to 697*l.*, and having a power of appointment over 21,000*l.* Consols, subject to her husband's life interest. By her will she directed, "first," that all her debts should be paid, and she then specifically bequeathed all her ready money. Her debts were paid out of the 697*l.* Held, on the death of her husband, in 1855, that the specific legatee was entitled to be repaid the 697*l.* out of the fund over which she had a power of appointment.

IN this suit, a question arose as to the effect of a direction to pay debts, &c., contained in the will of a married lady, who had a general power of testamentary appointment under her marriage settlement.

By the settlement made on the marriage of Sir *Henry* and Lady *Pynn*, a sum of 21,000*l.* £3 per Cents. was held on trust, during the joint lives of Sir *Henry* and Lady *Pynn*, to pay her an annuity of 150*l.* for her separate use, and the residue of the dividends to Sir *Henry Pynn* for life, with remainder to Lady *Pynn* for life, and, in the events which happened, Lady *Pynn* had a general power to appoint the fund by will during her coverture.

In 1849, Lady *Pynn* made her will as follows:—  
 "First, I direct all my just debts, and my funeral and testamentary expenses to be paid. I give, bequeath, limit and appoint, in pursuance of all powers and authorities in anywise enabling me in this behalf, all my clothes and all my ready money, and money which may be due to me at my decease, and all other articles of personalty belonging to me, and now being in the *Queen's* Hotel aforesaid, but not including jewels, trinkets and diamonds, over which I have no power to dispose, unto my faithful servant *Ann Woodman*;" and she appointed *Cowan* executor. There was no express residuary gift, and no further reference to the power.

Lady *Pynn* died in 1849, and at the time of her death

death she was possessed of ready money to the amount of 697*l.* 17*s.* 5*d.*, consisting of her savings out of the annuity of 150*l.*, and out of other income to which she was entitled for her life, for her separate use, under other instruments.

1857.  
LAING  
v.  
COWAN.

Prior to the date of her will and down to her death, Lady *Pynn* lived apart from her husband.

The debts of Lady *Pynn* were paid by her executor out of the sum of 697*l.* 17*s.* 5*d.* Sir *Henry Pynn* died in 1855, and the question was, whether these debts ought to be recouped to *Ann Woodman* out of the settled fund over which the testatrix had a general power of appointment by will.

Mr. *Faber*, for the Plaintiffs (the trustees of the settlement, one of whom was also one of the next of kin of Lady *Pynn*, and entitled under the settlement in default of appointment), claimed the entire fund comprised in the settlement as unappointed. He submitted, that as the next of kin had been ascertained by the Court, the fund ought to be divided amongst them according to the ultimate trust of the settlement.

Mr. *Greene*, for the executor of Lady *Pynn's* will, submitted, that inasmuch as the will of Lady *Pynn* could operate as an appointment under the power, without referring to the power or the fund subject to the power, the direction to pay her debts, &c. was a good appointment *pro tanto* of the settled fund, and that the bequest to *Ann Woodman* of the ready money ought to be made good out of the settled fund to the extent to which it had been applied in payment of the debts.

1857.

LAING  
v.  
COWAN.

He referred to *Curteis v. Kenrick* (a) and *Churchill v. Dibben* (b).

*The MASTER of the ROLLS.*

I think the legatee is entitled to have her legacy without any deduction for debts, and that as the debts have been paid out of the "ready money," the amount must now be made good out of the settled fund. The remainder of that fund will then be divided according to the trusts of the settlement, as in default of appointment.

(a) 9 Sim. 443.

(b) *Ibid.* 447.

DALY v. BECKETT.

April 24.

An estate, with the "mines and minerals," was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, &c., but so as the lessees should not be "dispunishable for waste." Held, that the last clause was repugnant, and that the trustees might demise mines, both opened and unopened at the date of the settlement. Held, also, that the royalty reserved by the lease was in the nature of rent, and was payable to the tenant for life, and did not form *corpus*.

THIS case came on upon demurrer, for the purpose of deciding the validity of a mining lease, granted by trustees, under the following state of circumstances :—

*Robert Richardson*, who died in 1837, devised and bequeathed all his real and personal estate to *Beckett*, *Crookes* and *Birks*, absolutely and unconditionally, and he appointed them executors. No documents were ever discovered intimating the reason why he had thus left them the whole of his property, in preference to his only child, the Plaintiff, Mrs. *Daly*, who had a family. They therefore thought it just and right to settle the property on the testator's daughter and her children.

Accordingly,

Accordingly, by indenture, dated the 14th of *February*, 1844, they conveyed the hereditaments, together with all houses, &c., "*mines, minerals,*" &c., to a trustee in fee, to hold to the use of the children of *Mrs. Daly*, as she should appoint, and in default "upon trust to receive the rents and profits of the said hereditaments and premises," and to pay the same to her for life, with remainder to her children, equally.

1857.  
  
 DALY  
 v.  
 BECKETT.

The deed contained a power, which was as follows:—  
 "Provided always, and it is hereby agreed and declared, by and between all and every the parties to these presents, that (notwithstanding any of the uses, trusts or powers hereinbefore contained), it shall and may be lawful to and for the said *John Staniforth Beckett, Richard Crookes, John Birks* and *William Newman*, and the survivors and survivor of them, and the heirs of such survivor, and their and his assigns, during the life of the said *Frances Daly*, by her direction, testified by some writing under hand, and to be attested by two or more credible witnesses, and after her decease, during the minority of any child of the said *Frances Daly*, of the proper authority of the trustees or trustee for the time being acting under these presents, at any time or times, by indenture of lease, to demise the said hereditaments and premises, or any part or parts thereof, *and the coal, minerals and stone* within or under the same, together with or separately therefrom, with the appurtenances, and to demise likewise all or any of the hereditaments and premises to be taken or received on any exchange, to be made under the power hereinafter contained, and the coal, minerals and stone within and under the same, together with or separately therefrom, to any person or persons, for any term or number of years not exceeding twenty-one years, to take effect in possession and not in reversion, or by way of future  
 1 2 interest,



1857.

  
 DALY  
 v.  
 BECKETT.

interest, so as there shall be reserved, in every such lease, the best or most improved yearly rent or rents that can be had for the same, without taking any fine, premium or foregift for making the same, and so as there shall be contained, in every such lease, a condition of re-entry on non-payment of the rents or rent, to be thereby respectively reserved, by the space of thirty days next after the same shall become due or payable, and so as the person or persons, respectively, to whom such lease shall be granted do and shall execute a counterpart thereof, whereby he, she or they shall covenant for the due payment of the rent or rents thereby reserved, *and so as he, she or they, and his, her or their executors, administrators or assigns, shall not, by any clause therein, be dispunishable for waste.*"

There were also, in the indenture, powers for the trustees to sell or exchange for other estates, all or any of the hereditaments and premises thereby conveyed, and the coal and minerals under the same, with a declaration, that such trustees or trustee should pay and apply the money to arise by any such sale, or to be received for equality of exchange in the purchase of such other hereditaments, and should settle the hereditaments, so to be purchased or received in exchange, subject to the same uses, trusts, powers and provisoes as by the now stating indenture were declared concerning the said hereditaments and premises thereby conveyed, or such of them as should be then subsisting or capable of taking effect. The indenture also contained the following proviso:—"Provided always, that in case the said trustees hereby appointed, or to be appointed as hereinafter mentioned, or the survivors or survivor of them, or the heirs of such survivor, or their or his assigns, should think fit to sell or dispose of or to demise, as aforesaid, any coal, mineral or stone, under the said hereditaments

hereditaments and premises comprised in these presents, or to be received in exchange or purchase as aforesaid, it shall and may be lawful to and for them and him respectively, to grant or demise all the usual powers and liberties, to the purchasers or lessees thereof, of erecting, making and using engines, gins, railways and roads for that purpose, upon and over such hereditaments and premises respectively, for the purposes of searching for, sinking pits for, getting, selling and taking away the same."

1857.  
DALY  
v.  
BECKETT.

The testator *Richardson*, in his lifetime, had let a seam of coal under the *Church Field* (part of the estate) to *Porter*, the owner of an adjoining colliery, and *Porter*, in the testator's lifetime, worked it from his adjoining colliery, by means of a pit sunk in the adjoining land, but the interest of *Porter* had determined in the testator's lifetime. After the death of the testator, and in *August*, 1843, the Defendants *Beckett*, *Crookes*, and *Birks*, as the devisees under the testator's will, let to one *Hopwood* (who then occupied a colliery under lands adjoining the *Church Field*, but which were not part of the estates devised by the will) so much of the coal under the *Church Field* as had not been got by *Porter*. Both *Porter* and *Hopwood* worked the coal under the *Church Field* from the adjoining collieries, but at the date of the settlement, no pit or shaft had been sunk upon any part of the lands comprised in the settlement.

At the date and execution of the settlement, the whole of the coal let to *Hopwood* had not been got, but he was working it. With this exception, no mine of coal or other mineral under the hereditaments and premises comprised in the settlement had been opened or worked prior to the settlement.

On

1857.  
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DALY  
v.  
BECKETT.

On the 12th of *April*, 1854, the trustees (in exercise of the power contained in the settlement, and at the request and by the direction of Mrs. *Daly*) demised all that bed or seam of coal lying within and under *Four Far Fields*, &c. (part of the hereditaments comprised in the indenture of settlement), together with liberty for the lessees to bore, search and sink pits to win, work and get the bed or seam of coal under the same closes, for the term of twenty-one years, at a yearly rent at the rate of 300*l.* per acre.

The closes in the lease were nearly half a mile distant from *Church Field*, and were separated therefrom by lands which were not part of the said settled estates.

The bill stated, that the trustees had received 366*l.* 2*s.* 11*d.* for royalty or rent reserved by the lease, but that they had refused to pay the same to Mrs. *Daly*, without the sanction and indemnity of this Court, alleging, that as they were advised, it was doubtful whether the whole of the rent or royalty ought to be considered as annual rents and profits of the settled estates, or whether the same ought to be considered as capital, and invested for the benefit of the parties entitled to the reversion and inheritance of such settled estates. The bill also stated, that Mrs. *Daly's* children claimed to be entitled to the rent or royalty reserved by the lease, as part of the *corpus* of the settled estates, and that they alleged, that the granting of the lease, by the trustees, was not a due exercise of the power of leasing, given or reserved by the settlement.

The bill prayed a declaration, that the lease was a due exercise of the power of leasing, by the indenture  
of

of settlement of the 14th of *February*, 1844, given or reserved to the trustees thereof. That the Plaintiff, as tenant for life, was entitled to the whole of the rent or royalty reserved or made payable by the lease, and for payment to her accordingly.

1857.  
Daly  
v.  
Beckett.

To this bill, the Defendants, the children, filed a general demurrer, in order that the opinion of the Court might be taken on these two questions.

Mr. *Follett* and Mr. *W. Pearson*, in support of the demurrer, argued two points. First, that the lease was not warranted by the power, for the demise of unopened mines authorized the tenant to commit waste, contrary to the express terms of the power; and, secondly, that the power must be exercised by the trustees for the benefit of all persons interested under the deed, and that they ought, therefore, to preserve the produce of the mines, which constituted the *corpus* of the estate, for the benefit of the Plaintiff for life, and afterwards for her children, who were entitled in remainder.

They cited *Campbell v. Leach* (a); *Whitfield v. Bewit* (b); *Astry v. Ballard* (c); *Sugden on Power* (d); *Coke on Lit.* (e); *Anon.* (f); *Clavering v. Clavering* (g); *Viner v. Vaughan* (h); The case of *Mines* (i).

Mr. *R. Palmer* and Mr. *Freeling*, in support of the bill, were not called on.

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| (a) <i>Amb.</i> 740.                 | (e) <i>Page</i> 54 b.     |
| (b) 2 <i>P. Wms.</i> 240.            | (f) <i>Dyer</i> , 374 b.  |
| (c) 2 <i>Lev.</i> 185.               | (g) 2 <i>P. Wms.</i> 388. |
| (d) Vol. 2, pp. 327, 328 (7th edit.) | (h) 2 <i>Beav.</i> 466.   |
|                                      | (i) <i>Plowd.</i> 310.    |

1857.

*The MASTER of the ROLLS.*

DALY  
v.  
BECKETT.

I entertain no doubt upon the construction of this settlement. It has given rise to an elaborate argument, which I have heard with some interest, upon points which, I think, do not arise upon the peculiar construction of this settlement.

The case of *Whitfield v. Bewit* (a) lays down very distinctly that where lands are settled with the general words, "and all mines, waters, trees, &c.," the tenant for life cannot work unopened mines, or cut down timber, although they are included in the general words. If, therefore, this case rested upon the mines being included in the general words conveying the property itself, I should be of opinion that they did not confer a general power of working the minerals. But here there is an express power of leasing, which includes not merely "the said hereditaments and premises, or any part thereof," but the "coal, minerals and stone within or under the same, together with or separately therefrom, with the appurtenances." That is, the coal, minerals and stone under any part of "the said hereditaments and premises" may be leased. It proceeds to say, that they may "demise, likewise, all or any of the hereditaments and premises to be taken or received, or any exchange to be made under the power thereafter contained, and the coal, minerals, and stone within and under the same, together with or separately therefrom, to any person or persons," on certain terms and conditions; but so as the lessees "shall not, by any clause therein, be dispunishable for waste, which two negatives mean, "so that they shall be punishable for waste." The question is, whether this proviso, at the end

(a) 2 P. Wms. 240.

end of the power, is repugnant to the power itself; because it is admitted that if it be so, it must be simply struck out, and could be of no avail. For instance, cases are cited for the purpose of shewing, that if there were no mines on the property, or if no mine had been opened, and no minerals whatever gotten, this expression that "the lessees should be punishable for waste" would not prevent a demise, and that the power would still take effect, and that the donees of the power might grant leases of the coal and minerals on the estate. It is also stated, there was one already opened on this property.

1857.

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DALY  
v.  
BECKETT.

I think, notwithstanding the cases referred to, especially *Campbell v. Leach* (a), and the comments upon it, that this clause, in the terms in which it is stated, is quite repugnant to the terms of the power which is given. This is a power to lease the coal and minerals situated under any part of the hereditaments and premises. How can it be said that it refers only to the mines already open, if it is a power to lease any portion of it? So, in the same manner, there is a power to lease the coal and minerals in any land taken in exchange; how can the power be limited to those minerals on the property taken in exchange which happen to be open? It is obvious that the plain and ordinary meaning is, that the trustees shall have power to lease the whole, and if so, these words which would simply destroy that power are repugnant to it, and have no effect.

I think this is also made clear by the proviso which follows, and which seems to have been introduced for the purpose of avoiding any question upon the subject.

It

(a) *Ambler*, 740.

1857.  
  
 DALY  
 v.  
 BRACKETT.

It is thus :—" provided always, that in case the said trustees," &c., &c. " should think fit to sell or dispose of or to demise as aforesaid any coal, mineral and stone under the said hereditaments and premises," (which is a power to demise any coal or minerals under any part of the premises,) it shall be lawful for them to grant or demise all the usual power and liberties to the lessees of erecting engines and making roads for that purpose.

Now the plain and obvious meaning of this is, not merely that if you want an additional pit in an existing mine that you shall be at liberty to make it, but having a power to grant leases of all minerals under any part of the estate, here is a power to enable the lessee to sink any pits, and make any roads necessary for that purpose. That appears to me to distinguish this from the other cases to which reference has been made, and to shew that this power must be struck out altogether, unless I hold that it is to be confined to the existing leases.

I think, though I cannot act upon any such surmise, that it was a mistake of the draftsman, who did not consider the meaning of the word "dispunishable:" I think so, because the word is not put as a limitation, but as if some additional power is given; because also, the double negative is a very singular form of expressing an affirmative proposition in a deed; and further, because it certainly does happen in some few instances, that the word "dis," prefixed to a word, does not give a negative meaning, such as, for instance, "disporting," which is a common expression meaning the same thing as sporting. It would be impossible for me to act upon that surmise, because the plain meaning of the words is, "so that they shall not, by any clause therein, be not punishable for waste;" and taking it in that proper

proper grammatical sense, I am of opinion that it is repugnant to the leasing clause, and that it must be treated as having no effect.

1857.  
  
 DALY  
 v.  
 BECKETT.

With respect to the second point, as to how the produce of the mine is to be considered, I must treat it, if I am right in my view as to the first point of the case, as if this were an ordinary power to lease the mines and minerals, in which case, all the authorities establish this: that the produce of the mines is made part of the annual profits of the estate, and that whether in royalties, or in whatever other way it is produced, it forms part of those profits, and that it is not to be treated like timber cut, where the produce of it is invested, and the interest only is paid to the tenant for life.

I am of opinion that the produce of the mines belongs to the tenant for life.

This demurrer must therefore be overruled.

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NOTE.—See also *Winter v. Loveden*, 1 *Lord Raym.* 267; *Jones d. Couper v. Verney*, *Willes*, 169; *Walker v. Wakeman*, *Vent.* 294.



1857.

LINDSEY, an Infant, by his Father and next Friend  
v. TYRRELL.

May 28.

An order giving liberty to an infant, suing by a next friend, to proceed *in forma pauperis*, discharged, with costs, as irregular.

THE bill, in this case, was filed on the 1st of April, 1857, in the usual way in the name of an infant, by his next friend. On the 16th of April the Plaintiff obtained an *ex parte* order, which was as follows: "The Plaintiff, in respect of his poverty, whereof affidavit is made, is this day admitted by the Lord Chancellor to prosecute this suit *in forma pauperis*, by John Thomas Lindsey, his next friend," &c., &c.

This order had been obtained upon the affidavit of the infant, sworn on the 27th of March, 1857, which was as follows:—"I am not worth 5*l.*, my wearing apparel and the subject-matter of this suit excepted."

It was now moved that the order might be discharged for irregularity.

Mr. *Smythe* in support of the motion. This order is altogether irregular and contrary to the practice of the Court. "Infants cannot sue as paupers." This is stated in *Squirrel v. Squirrel*(a); and Lord *Thurlow* says, "It is very clear a next friend would not be allowed to sue *in forma pauperis*;" *Anonymous*(b). In *Bryant v. Wagner*(c), which was relied on by the Plaintiff when this order was obtained, it does not appear whether the Plaintiff was an infant or a married woman; and there is a marked

(a) 2 *Dickens*, 766.(b) 1 *Ves. jun.* 409.(c) 7 *Dowl. Practice Cu.* 676.

marked difference between the two cases, as is pointed out in *Hind v. Whitmore* (a). The next friend of a married woman must be a person of substance; that is not required in the case of the next friend of an infant. Again, the affidavit is as to the infant being a pauper, and not that the next friend is so.

1857.

LINDSEY,  
an Infant, by  
his Father and  
next Friend  
v.  
TYRRELL.

*Mr. A. H. Lewis contra.* The statute of the 11 *Hen.* 7, c. 12, authorizes "every poor person or persons," without any exception, to sue *in formâ pauperis*; and in *Bryant v. Wagner* (b), the Plaintiff was admitted to sue *in formâ pauperis* and by *prochein ami*. The practice as to infants is analogous to that in the case of married women; and the Court favours infants who are unable to protect themselves, and encourages persons in bringing their rights *bonâ fide* before the Court. Here the next friend is his father, who is the most proper person to be his next friend, but who unfortunately happens to be in poverty. There is a mistake in the form of the affidavit, but that may easily be corrected.

*Dowden v. Hook* (c), and *Ogilvie v. Herne* (d), were also referred to; and see *Doe d. Selby v. Alston* (e).

#### *The MASTER of the ROLLS.*

I think that this order is wrong, and cannot stand. In the first place, there is no analogy between the case of a married woman and an infant. An infant has peculiar privileges and advantages. The Statute of Limitations does not run against him, he is not affected by the lapse of time, and when he comes of age he may take


(a) 2 *Kay & J.* 458.

(b) 7 *Dowl. Pr. Ca.* 676.

(c) 8 *Beav.* 399.

(d) 11 *Ves.* 598.

(e) 1 *Term Rep.* 491.

1857.  
  
 LINDSEY,  
 an Infant, by  
 his Father and  
 next Friend  
 v.  
 TYRELL.

take any proceedings he may think proper unaffected by the delay occurring during his infancy. This Court does not make any distinction between an infant of twenty months and one of twenty years of age, for any body who pleases may institute a suit on behalf of an infant; and this Court has, in some cases, disapproved of suits instituted in the names of infants nearly adult, in which they have neither been consulted, nor exercised any option; but, on the other hand, cases have frequently occurred, where, when infants were about to make imprudent marriages, bills have been filed in their names, asking the Court to interfere and stop the marriage. I mention this instance to shew the distinction, and to point out, that it is not necessary to consult an infant as to proceedings in his name.

But a married woman, in respect of her separate estate, is treated as a *feme sole*, and as cognizant of her rights, and this Court would not allow a suit to be instituted in the name of a married woman without her consent (a); while as regards an infant, the Court disregards his consent, and any body may come forward and institute a suit in his name: that is the distinction.

Where a married woman cannot get a next friend, this Court has dispensed with one, and has allowed her to sue without a next friend and *in formâ pauperis*; but I am not aware of any instance, in which a married woman has been allowed to sue by her next friend and *in formâ pauperis*. I never knew of such an order. If there be any analogy, this order ought to have been, that, inasmuch as the infant could not get a next friend, he should be allowed to sue without one. If the order  
 stands,

(a) See *Cooke v. Fryer*, 4 Beav. 16.

stands, I see no reason why any infant should sue in any other way than *in formâ pauperis*. The like order will be obtained in every case, for it is very rare that infants have property of their own.

1857.

LINDSEY,  
an Infant, by  
his Father and  
next Friend  
v.  
TYRELL.

I think that the Plaintiff is not entitled to sue *in formâ pauperis*, and I must, therefore, discharge the order with costs.

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NOTE.—Affirmed by the full Court of Appeal, December 16, 1857.

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YEOMANS v. HAYNES.

THIS suit was instituted for the administration of the estate of *Sarah Yeomans*.

June 2, 5.

An alleged creditor carried in a claim, in an administration suit, for a debt alleged to be due from the testator. The claim having been disallowed, the claimant was ordered to pay the costs of the proceeding.

Under the decree, the usual inquiry was directed as to debts. Mr. *Yeomans* and *John Proctor* took in a claim, before the Chief Clerk, for 665*l.* and interest, in respect of a debt alleged by them to be due from the testatrix. They supported their claim by affidavits, and the executrix having made an affidavit in opposition, the Claimants cross-examined her at great length, and afterwards filed affidavits in reply. The Chief Clerk disallowed the claim.

The executrix afterwards applied, by summons, for an order on the Claimants to pay the costs of and occasioned by their claim. These the executrix estimated at 50*l.* The summons was adjourned into Court.

Mr.

1857. Mr. *R. Palmer* and Mr. *L. Mackeson*, in support of  
the application, relied on *Hatch v. Searles* (a).  
YEOMANS  
v.  
HAYNES.  
Mr. *Whitbread*, for the Plaintiff.

Mr. *Selwyn*, for the Claimants, argued, that there were reasonable grounds for making the claim; that the Court had no jurisdiction to make the Claimants, who were not parties to the suit, pay the costs, and that the whole matter must be considered as disposed of.

*The MASTER of the ROLLS.*

I have no doubt that I have authority to order the Claimants to pay the costs; I have no doubt as to the jurisdiction. But the question is, whether the costs ought not to have been applied for at the time; that is the usual course. I will ask my Chief Clerk.

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June 5. *The MASTER of the ROLLS.*

I have consulted my Chief Clerk, and I am of opinion that the Claimants must pay the executrix the costs of their unsuccessful claim.

(a) 2 Sm. & G. 147.

1857.

DIXON v. DIXON.

**T**HE testator gave 200*l.* to trustees, to be applied for the benefit of his daughter *Harriet*, but if she died before the whole should be expended, he directed the residue thereof to be paid to "*her personal representative.*"

The testator gave the residue of his real and personal estate to two trustees (the Plaintiffs), in trust to pay one-third of the income to his wife for life, and during his wife's life, to pay another third to his daughter *Amelia*, and the remaining one-third to his daughter *Harriet*.

He proceeded as follows:—"Provided that in case either of my said daughters should die in the lifetime of my said wife, her share of the yearly produce of my estate shall be applied to and for the maintenance of any lawful child or children of my said respective daughters. And in default of lawful issue of either of my said daughters respectively, the yearly proceeds of my estate be divided equally between my said wife and any surviving daughter during the lifetime of my said wife. And if both of my said daughters should die in the lifetime of my said wife, and without lawful issue surviving, that my said wife do receive the whole of the net annual proceeds of my estate during her lifetime.

"And upon trusts, that immediately after the decease of my said wife, they, my said trustees, or the survivors of them, or the executors or administrators of such sur-

*June 2, 3, 4.*  
A testator, after the death of his daughter, gave real and personal estate to her "legal personal representative or representatives," to hold to them, their "heirs," executors, &c. according to the nature of the property. She left a husband, who took out administration, and an only child. Held, that the husband took both the real and personal estate.

1857.



DIXON

v.

DIXON.

vivor, do pay one moiety or equal half-part of all the said net annual produce to my daughter *Amelia Dixon*, during her life, and do apply the other moiety or equal half-part thereof to and for the maintenance and support of my daughter *Harriet Taylor*, during her life.

“ And upon trust, that after the decease of either of my said daughters, they, my said trustees, do pay a moiety of the said net annual produce to such person or persons as shall have been nominated in the last will and testament of such deceased daughter to receive the same, and in default of such nomination, then to *her legal personal representatives*, until the decease of the survivor of my said daughters. And upon trust, that immediately after the decease of the survivor of them my said daughters, they, the said trustees, or the survivor of them, or the executors or administrators of such survivor, do assign one moiety of my real and personal estate unto such person or persons as may be nominated in and by the last will and testament of my said daughter *Amelia Dixon*, and in default of such nomination, then to her *legal personal representative or representatives*; and the other moiety thereof to such person or persons as may be nominated in and by the last will and testament of my said daughter *Harriet Taylor* (if she shall be competent to make a will); and in default of such nomination, then to the lawful child or children (if any) of the said *Harriet Taylor*; and in default of any such child or children, then to *the legal personal representatives or representative* of my said daughter *Amelia Dixon*, to hold to the respective persons hereinbefore mentioned, or intended so to be, their *heirs*, executors, administrators and assigns for ever, according to the nature and quality of the property to which they or any or either of them may be entitled under this my will.

“ And

" And it is my express will, that no receipt shall be necessary to be given by any husband or husbands of my said daughters, or either of them, but the receipt of my daughter *Amelia Dixon* shall be a sufficient discharge to my said trustees, and that the receipts of such persons to whom money may be paid for the maintenance and support of my daughter *Harriet Taylor* shall be sufficient discharges to my said trustees. And it is also my will, that if at the decease of my said daughter *Harriet Taylor* there should be any sum of money in the hands of my trustees on her account, that the same, after payment of her funeral expenses, be paid to the same person or persons as her share of my other effects shall be paid or assigned to, excepting her mother be living, in which case I direct one-half thereof to be paid to her, and the other moiety to my daughter *Amelia Dixon*, or her *representatives*, if there should be no child or children of my said daughter *Harriet Taylor* or legatee nominated in her will."

1857.

*DIXON*  
v.  
*DIXON.*

The testator died on the 22nd of *December*, 1851, and his daughter *Amelia* died the next day, without having exercised her power of appointment. *Amelia* left a son by her first marriage, viz., the Defendant *Matthew Dixon*; and a daughter, by her second marriage, who died about a fortnight afterwards. Her second husband, *Joseph Parker*, survived her, and took out administration to her estate.

The testator's widow died in 1853, and the Defendant *Joseph Parker*, as *legal personal representative* of *Amelia*, claimed to be solely entitled to the one moiety of the testator's residuary estate, which consisted of freehold, leasehold and personal estate. This suit was instituted by the trustees against the husband and child of *Amelia*, to have the construction of the will determined.



1857.

Mr. *Bernard*, for the Plaintiffs.

*DIXON*  
v.  
*DIXON.*

Mr. *R. Palmer* and Mr. *Vincent*, for *Matthew Dixon*, the infant son of *Amelia* by her first marriage. The words "legal or personal representatives" may mean next of kin; but executors or administrators cannot; *Daniel v. Dudley* (a). Here the expression "personal representatives" cannot be treated as meaning "executors and administrators," because the testator has used these words in another part of his will, which shews he intended something different. Here, as in *Booth v. Vicars* (b), the word "representatives" mean the persons who, by force of law, in right of consanguinity, would take the personal estate beneficially. But besides this, the will affects real estate, which distinguishes this case from the decisions on mere personalty. If the administrator takes the realty in his representative character, it will be liable to debts, and he must take it as personalty; but the testator has given no power to sell it for that purpose. Again, the limitation to the "heirs," &c., of the personal representatives, according to the nature and quality of the property, shews, that on the death of the administrator, his heir, and not the administrator *de bonis non* of the daughter, is to take the real estate. Therefore these expressions cannot mean the legal personal representatives in the strict sense of the term, but the nearest in consanguinity to the daughter, viz., her child and heir at law, to the exclusion of her second husband.

Mr. *Selwyn* and Mr. *C. C. Barber*, for *Joseph Parker*, the second husband and administratrix of *Amelia*, were heard.

T h

(a) 1 Phil. 6.

(b) 1 Coll. 12.

*The MASTER of the ROLLS.* I am of opinion that these words mean "legal personal representatives" in the ordinary sense, and that the property must go to the husband as such legal personal representative. The modern cases are too strong to attach any other meaning to this expression.

1857.

~  
DIXON  
v.  
DIXON.

*Mr. Bernard.* Does this apply to the real estate?

*The MASTER of the ROLLS.* Yes; the whole goes to the surviving husband.

*The MASTER of the ROLLS* allowed this case to be mentioned again, when

June 3.

*Mr. R. Palmer* and *Mr. Vincent* re-argued the case. They referred to *Daniel v. Dudley* (a); *Smith v. Barneby* (b); *In re Crawford's Trusts* (c); *Long v. Watkinson* (d); *Wellman v. Bowring* (e); *Ripley v. Waterworth* (f); *Walter v. Makin* (g); *Walker v. The Marquis of Camden* (h); *Robinson v. Smith* (i); *Minter v. Wraith* (k); *Graffley v. Humpage* (l); *Kilner v. Leech* (m); *Hinchliffe v. Westwood* (n); *Atherton v. Crowther* (o); *Jarman on Wills* (p); *Saberton v. Skeels* (q).

*The MASTER of the ROLLS*, during the argument, said, he thought it important to distinguish those authorities which preceded Lord *Cottenham's* decision in *Daniel v. Dudley* (r).

Mr.

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|------------------------------|-------------------------------|
| (a) 11 Sim. 163; 1 Phil. 1.  | (k) 13 Sim. 52.               |
| (b) 2 Coll. 736.             | (l) 1 Beav. 46.               |
| (c) 2 Drew. 230.             | (m) 10 Beav. 362.             |
| (d) 17 Beav. 471.            | (n) 2 De G. & Sm. 216.        |
| (e) 3 Sim. 328; 2 Russ. 374. | (o) 19 Beav. 448, 451.        |
| (f) 7 Ves. 425.              | (p) Vol. 2, p. 87 (2nd edit.) |
| (g) 6 Sim. 148.              | (q) 1 Russ. & Myl. 587.       |
| (h) 16 Sim. 329.             | (r) 1 Phil. 1.                |
| (i) 6 Sim. 47.               |                               |

1857.

DIXON

v.

DIXON.

Mr. *Selwyn* and Mr. *C. C. Barber* were not called on.

*The MASTER of the ROLLS.*

I will look more carefully over the will, and then state my opinion. But my present view, which has not been shaken by the very ingenious argument on this will, with reference to the cases, is this:—

I find that in this will, the words "*personal representatives*" are very frequently used. The testator directs that if the whole of the legacy of 200*l.* be not expended for the benefit of his daughter *Harriet*, the residue of it shall be paid to her "*personal representative*." It would be very difficult, in this instance, to hold, that "*personal representative*" does not mean her "*executor or administrator*," or that such persons did not take in their representative character.

Passing over the next passages, I find that the testator goes on to say, with respect to the provision made for his daughters, after the death of his wife, that after the decease of either of the daughters, half the income shall be paid to her appointee, and in default, then to her "*legal personal representatives*," until the death of the survivor of his daughters. What is the meaning of this, who can her "*legal personal representatives*" mean, except her executors or administrators, who are the legal personal representatives in the ordinary sense of the words? It is to be observed, in the first instance, he uses the words "*personal representative*;" but in the next he says "*legal personal representatives*," shewing he means it in the legal and technical sense of the words.

In

In the next sentence, after the decease of both daughters, he gives one moiety, in default of appointment, to the "legal personal representative or representatives" of his daughter *Amelia*. Therefore he first speaks of "personal representative," then he talks of "legal personal representatives," and then of the "legal personal representative or representatives." It is difficult to say that these words are not to be construed in the same sense, although the words "legal personal representatives" are more precise than "personal representatives."

1857.

*Dixon*  
v.  
*Dixon*.

He gives the other moiety to be paid to "the legal personal representatives or representative" of *Harriet Taylor*. Then again, for the fourth time, the words are used in the same sense, and have the same meaning. Then these words follow :—"To hold to the respective persons hereinbefore mentioned or intended so to be, their heirs, executors, administrators and assigns, for ever, according to the nature and quality of the property to which they or any or either of them may be entitled under this my will." It is argued, that by "the persons hereinbefore mentioned," he means the legal personal representatives, and I think correctly.

It appeared to me that some question might arise as to whether the representatives take beneficially or in trust, *Long v. Watkinson* (a). It is not necessary to express any opinion on the subject, for here the same person would take in either character, and, therefore, the case does not raise the particular point, but I should be disposed to think that they take in their representative character.

The

(a) 17 *Beav.* 471.

1857.

DIXON

v.  
DIXON.

The word "representatives" is again used, for the fifth time, in the last clause in this will, though in a less clear manner.

I think that these words must mean "executors and administrators;" it is the only sense they bear in the other parts of the will, and I think I cannot give them a different sense in the passage in question. It is desirable that I should look at the cases, and if I should entertain any serious doubt, I will mention the case again.

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June 4.

*The MASTER of the ROLLS.*

I have considered this case and the authorities, and my opinion remains unchanged.

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## DECREE.

Declare, that on the death of the widow, *Joseph Parker*, as the legal personal representative of *Amelia Parker* (formerly *Amelia Dixon*), became entitled, in possession, to one moiety of the real, leasehold and residuary personal estate of the testator, and in remainder, expectant upon the decease of *Harriet Taylor* without lawful child or children and in default of appointment by her, to the other moiety.

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1857.

*In re* THE ELECTRIC TELEGRAPH COMPANY  
OF IRELAND. (No. 2.)

*Ex parte* BUNN.

**A**N order had been made to wind up this Company in the Judges' Chambers (a).

Mr. *Bunn*, an alleged contributory, was summoned to appear before the *Master of the Rolls* in chambers, and there to be examined, and produce documents. Mr. *Bunn* accordingly attended the summons, but refused to be sworn.

It was now moved, on behalf of the official manager, that Mr. *Bunn* be forthwith committed to the *Queen's* Prison, or that he be ordered to appear before the *Master of the Rolls*, and be sworn and examined before him or before his Chief Clerk, and in default that he stand committed.

Mr. *Selwyn* and Mr. *J. H. Humphreys* in support of the motion. Under the Winding-Up Act (11 & 12 *Vict.* c. 45, s. 63) any person, whether a contributory or not, may be summoned before the Master, and if he refuses to be sworn, he is liable to be committed; but this proceeding being in Chambers is governed by The Masters in Chancery Abolition Act (15 & 16 *Vict.* c. 80, s. 30), which gives the Judge's Chief Clerk authority to administer oaths and examine parties or witnesses *vivâ voce*. Mr. *Bunn* was therefore not justified in objecting to be sworn.

(a) See 22 *Beav.* 471.

*April 20.*

A party interested, being summoned to appear as a witness, is not justified in refusing to be sworn before the Chief Clerk, on the ground that he will not be able to have the assistance of Counsel before the Chief Clerk, and that he ought, therefore, to be examined before the Judge or the Examiner.

Mr.

1857.

*In re* The  
ELECTRIC  
TELEGRAPH  
Company of  
Ireland.

*Ex parte*  
BUNN.

Mr. *R. Palmer* and Mr. *Roxburgh* *contrà*. Mr. *Bunn* is not only summoned in the character of a witness, but as a party sought to be charged by his own evidence. He is entitled to the protection and has a right to have the assistance of Counsel to conduct the cross-examination, and as, by the rules of the profession, Counsel never attend the Chief Clerk, he has a right, strictly, to have the examination before the Judge or the Examiner. It is true that parties may proceed before the Chief Clerk for their own convenience, but if they wish to go before the Judge, "it is the invariable practice in all the [Judge's] chambers to give them an opportunity of doing so directly;" *Hayward v. Hayward* (a). The matter should therefore be heard before the Judge or be referred to the Examiner, where Counsel can attend.

He would have had this right to have Counsel before the Masters in Chancery, and the act abolishing that office never intended to deprive him of that protection.

They also referred to *Stebbing v. Atlee* (b).

*The MASTER of the ROLLS.*

I think that Mr. *Bunn* is mistaken in his view of the case, and of what the position of a witness is before the Chief Clerk and before the Court.

I will endeavour to state my view in that respect. I apprehend that a witness has not an abstract right to say, that he will not be examined except in the presence of Counsel. There are a great number of cases in which this cannot be done: sometimes, because Counsel will not attend, and at other times, because the parties have not the means of employing Counsel. A great portion  
of

(a) *Kay, App.* p. xxxiii.

(b) 26 *L. J. (CA.)* 265.

of the criminal business of this country is disposed of without Counsel, even prisoners have rarely the pecuniary means of employing Counsel; yet the Court never considers them to have an abstract right to the assistance of Counsel: it cannot be an abstract right if it depend on whether a man has or has not the means of employing Counsel. What Mr. *Bunn* is entitled to is this:—he is entitled to have the opinion of the Judge whether he shall have the assistance of Counsel or not.

In *Hayward v. Hayward* (a), the Chief Clerk thought fit to decide on the insufficiency of the defendant's answer to interrogatories in chambers, and to make an order that he should attend and make perfect answer to the interrogatories, and, if not, that he should stand committed. The Vice-Chancellor said, that he must determine the insufficiency, before the party could be committed, and therefore he examined him himself.

Here the witness has refused to be sworn, and the question comes before me to determine whether he shall be sworn or not. It is not a question whether Mr. *Bunn* has a right to the assistance of Counsel or not; or whether the case should be heard before me or the Examiner. That is an application which he might have made to the Chief Clerk, and if the Chief Clerk had refused it, he might have appealed to me, and I should have determined whether it was a fit case to have him examined before the Examiner, or whether it was proper that I should take the examination myself. But Mr. *Bunn* thinks fit to say, that he will not submit this question for the determination of the Judge, but that he will decide it himself, and insist on its being done in his own way, whether the Court shall be of an opposite opinion

(a) *Kay, App.* p. xxxiii.

1867.

*In re* The  
ELECTRIC  
TELEGRAPH  
Company of  
Ireland.

*Ex parte*  
BUNN.



1857.

*In re* The  
ELECTRIC  
TELEGRAPH  
Company of  
Ireland.

*Ex parte*  
BUNN.

opinion or not. The question therefore is, whether, *invidiâ Curia*, the witness has a right to say, "I will be examined in a particular manner." I am of opinion that he has no such right; that the Chief Clerk has full power to examine a witness; and that a person, not refusing to be sworn on any religious ground, which would enable him to be examined on his simple affirmation under the statute, is not entitled to say, "I will refuse to be sworn as a witness at all." He may make an application to me, and say, "This is a case of so much importance that I desire to have the assistance of Counsel, and I desire to be examined before the Examiner." That is not the case now before me, and I express no opinion on it until it comes regularly before the Court for its determination.

If I were to allow a witness, at his own will and pleasure, to resist being examined by the Chief Clerk, it would simply repeal the 30th clause of the statute "The Masters in Chancery Abolition Act."

I am of opinion that Mr. *Bunn* is wrong in this matter, and that he must submit to be sworn and examined.

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1857.

## TUGWELL v. SCOTT.

June 5, 6.

**T**HE testator made his will in 1831 and died in 1832. The state of his family, at those periods, was as follows:—His sister *Mary* who, in 1769, had married *Joseph Armstrong*, was dead at the date of his will, having left two children, viz., *John Armstrong* (born in 1766, before his mother's marriage, and therefore illegitimate) and *William Armstrong* (born in 1769, during his mother's coverture, and therefore legitimate). *John Armstrong* had eight children. *William Armstrong* was dead at the date of the will, and had one child only, viz., *Mary Armstrong*.

At the date of his will and at his death, the testator had no brother or sister living, and he had had no nephews except *John* and *William* (the two children of his sister), and he never had any niece; though the evidence shewed that he was in the habit of calling the wives of *John* and *William* his nieces.

By his will, dated in *July*, 1834, the testator bequeathed to trustees the sum of 1,000*l*. New Four per Cent. Annuities, upon trust to pay the dividends thereof "to his nephew *John Armstrong* and his wife, then residing at *Haydon Bridge*, in the county of *Northumberland*, during their joint lives and the life of the survivor of them," and after the death of such survivor then upon trust to pay it to the grandchildren of *John Armstrong*. And he also gave to *Joseph Armstrong*, *Edward Armstrong*, *John Armstrong*, and *Robert Armstrong*, children  
of

A testator had only one illegitimate nephew (*John*), and only one legitimate nephew (*William*), and he had no nieces. By his will he gave a legacy to *John*, whom he described as "his nephew," and he gave his residuary estate "to the children lawfully begotten of his nephews and nieces." Held, that the children of *John* participated in the residue.

1857.  
 ~~~~~  
 TUGWELL  
 v.  
 SCOTT.

of his said nephew *John Armstrong*, the sum of 1,000*l.* each New Four per Cent. Annuities. The testator gave to his wife the sum of 1,000*l.* sterling, upon trusts for *Mary Armstrong*, the daughter of his late nephew *William Armstrong*. And he devised and bequeathed the residue of his real and personal estate to trustees upon trust to convert into money and invest the same, and to pay the annual dividends thereof unto his wife for life, and after her decease, upon trust to pay or transfer the same "unto all and every the children lawfully begotten of his *nephews and nieces*, equally to be divided between them, share and share alike."

The question was this:—who were entitled to the residue (subject to the widow's life interest) under the gift to "the children lawfully begotten of his *nephews and nieces*."

The Plaintiffs were six of the children of *John Armstrong*.

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Mr. *R. Palmer* and Mr. *Bazalgette*, for the Plaintiffs, argued that all the children of *John* were entitled to participate in the residue, the testator having distinctly stated that he considered *John* as "his nephew." They cited *Evans v. Davies* (a); *Gill v. Shelley* (b); *Leigh v. Byron* (c); *Owen v. Bryant* (d); *Wilkinson v. Adam* (e); *Hartley v. Tribber* (f).

Mr. *Springall Thompson* for the trustees.

Mr.

•

(a) 7 *Hare*, 498.  
 (b) 2 *Russ. & Myl.* 336.  
 (c) 1 *Sm. & G.* 486.

(d) 2 *De G., M. & G.* 697.  
 (e) 1 *Ves. & B.* 422.  
 (f) 16 *Beav.* 516.

Mr. Henry F. Shebbeare for William Woods, a mortgagee of the interest of some of John's children, argued that the word "nephews," in the plural, could only be satisfied by including the children of John; that the testator had himself, in a previous part of his will, interpreted his meaning of the expression "nephew," for he treated and designated John as "his nephew," and must therefore have intended John's children to share in the residue. In addition to this, that the testator had made a marked distinction, by calling the children of the nephews "children lawfully begotten," while he attached no such qualification to the expression "nephews."

1857.

TUGWELL  
v.  
SCOTT.

Mr. Lloyd and Mr. Shebbeare for Mary Armstrong, argued, that the children of John were excluded, for the words must have their ordinary meaning and that it was perfectly settled, that in ascertaining a class, illegitimate children could not be included, so as to form a portion of the class in conjunction with legitimate children. They argued also that the words would not be satisfied by the mode proposed, as the testator had no nieces. The cases of *Shelley v. Bryer* (a); *Harris v. Lloyd* (b); *Warner v. Warner* (c); *Mortimer v. West* (d); *Hart v. Durand* (e) were relied on.


*The MASTER of the ROLLS.*

June 6.

I think, upon the construction of this will, that the children of the illegitimate nephew are entitled to share in the residue.

I fully concur in the argument, that if the exact words of the bequest can be satisfied by that construction,

(a) *Jacob*, 207.(b) *Turn. & R.* 310.(c) *15 Jur.* 141.(d) *3 Russ.* 370.(e) *3 Anst.* 684.

1857.  
  
 TUGWELL  
 v.  
 SCOTT.

tion, then that the children of the legitimate nephew only can take; but for that purpose I must look at the exact words of the bequest, and see if they can be satisfied, except by admitting the children of the illegitimate nephew; and if, in other parts of the will, I find the illegitimate nephew so described as to come within this clause, then I think that the fair presumption is, that the testator also intended his children to come within this clause, and that they should take under the description of "children of my nephews."

It is a question of intention, to be collected from the will, and, as a primary rule, it is to be assumed, that whenever a testator uses the word "children" or "nephews" or other class of relatives, he *primâ facie* means legitimate children, nephews or relatives. Then what the testator has done is this:—he gives the residue "unto all and every the children lawfully begotten of my nephews and nieces." The question is, whom does he mean by "his nephews and nieces?" The first thing that appears by the evidence is, that, properly speaking, he had no nieces, and that he had only one legitimate nephew. Next, there is evidence that he was in the habit of calling the wives of his nephews "nieces;" which is not at all an unusual use of the word. They might more properly be called "nieces-in-law," but that is not usual, although it is usual to call the husband of a daughter "son-in-law," and the wife of a son "daughter-in-law." Then I find, in other parts of the will, a person named whom he expressly calls "his nephew *John Armstrong*," and to whom he gives legacies. There can be no doubt that he was illegitimate, but there is an express definition of him as "*John Armstrong* his nephew." I have no means of satisfying the word "nephews," in the plural, or "nieces" in the plural, according to the sense in which the testator employs

employs it, except by including the illegitimate nephew in these words, that is by saying, that the testator intended to include, in this gift of the residue, *John Armstrong* as one of his nephews, whom in his will he has so called two or three times over. I think, then, that the proper and legitimate inference is, that he intended to include him as one of his nephews. In coming to this conclusion, I proceed on the same principle as I did in *Worts v. Cubitt (a)*. I will, therefore, make a declaration to that effect.

(a) 19 *Beav.* 421.

1857.

TUGWELL  
v.  
SCOTT.

# *Re* GREEN'S PATENT.

THIS was an application made under the power contained in the 15 & 16 *Vict.* c. 83. The 35th section provides, that a "*Register of Proprietors*" shall be kept at the office for filing specifications of patents, wherein shall be entered the assignment of any letters-patent, and copies of which entries are to be *primâ facie* proofs of the assignment. The clause proceeds—"Provided always, that until such entry shall have been made, the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licences and privileges thereby given and granted."

The 38th section provides as follows:—"If any person shall deem himself aggrieved, by any entry made, under colour of this Act, in the said register of proprietors, it shall be lawful for such person to apply, by motion, to the *Master of the Rolls*, or to any of the

*April 16, 23.*

A patentee, in 1853, assigned his patent, but the assignees omitted to register it under the 15 & 16 *Vict.* c. 83, s. 35. Afterwards, in August, 1855, the patentee assigned the patent to another person, who registered it on the same day. The first assignees registered their assignment a week afterwards. The Court, in 1857, on the motion of the first assignees, ordered the register of the

second assignment to be expunged, and with costs, under the 38th section.

1857.  
 Re  
 GREEN'S  
 Patent.

Courts of Common Law at *Westminster*, in Term time, or by summons to a Judge of any of the said Courts in Vacation, for an order that such entry may be expunged, vacated or varied; and upon any such application, the *Master of the Rolls*, or such Court or Judge respectively, may make such order for expunging, vacating or varying such entry, and as to the costs of such application, as to the said *Master of the Rolls*, or to such Court or Judge may seem fit, and the officer having the care and custody of such register, on the production to him of any such order for expunging, vacating, or varying any such entry, shall expunge, vacate, or vary the same, according to the requisitions of such order."

The circumstances which gave rise to the present application were as follows :—*George Green*, a mechanic, while in the employ of Messrs. *Wilson* and *Hamilton*, invented certain improvements in the machinery for manufacturing casks, and it was agreed that the patent should be taken out by *Green*, at the expense of Messrs. *Wilson* and *Hamilton*, and then be assigned to them, upon an arrangement that, if the patent should prove valuable, they should make *Green* "a reasonable compensation or allowance for the same."

The patent was accordingly obtained by *Green* on the 1st of *October*, 1852, and was assigned by him to Messrs. *Wilson* and *Hamilton* on the 27th of *January*, 1853, but they omitted to register the assignment under the Act.

In 1855, some disagreement took place as to the remuneration to be made to *Green* by Messrs. *Wilson* and *Hamilton*; on which he, on the 18th of *August*, 1855, in consideration of 50*l.*, executed a second assignment

ment of the patent to his father, which was registered on the same day.

Messrs. *Wilson* and *Hamilton* did not register their assignment until the 25th of *August*, 1855.

It was now moved, on behalf of Messrs. *Wilson* and *Hamilton*, that the entry of the 18th of *August*, 1855, might be expunged, and that *George Green* and his father might pay the costs of this application.

Mr. *R. Palmer* and Mr. *Webster*, in support of the motion.

Mr. *Jessell*, *contrà*. The Applicants are not aggrieved by any entry made under colour of the Act. Their real grievance arises, not from the entry, but from their own neglect to enter their assignment of 1852, as the Act required them to do. If that assignment had been properly entered, no possible damage could have arisen from the entry of the subsequent assignment. There has been no fraudulent entry, and by the 35th section, until an entry had been made of the assignment of 1853, the grantee (*Green*) is to be deemed and taken to be the sole and exclusive proprietor of the letters-patent. If, then, the Applicants had never registered their assignment, they could not apply under the Act. [Mr. *R. Palmer*. I agree to that.] This is a case of a dispute as to title between the parties, which is not the proper subject for this summary remedy; and the motion being made to remedy the Applicants' own neglect and laches, it is not a case entitling the Applicants to costs.

*The MASTER of the ROLLS.*

The *bonâ fide* proprietors of a patent find on the registry an entry of an assignment; if it be allowed to remain, the result will be, that it will become very difficult for them to make their own patent available.

L 2

A purchaser

1857.

Re  
GREEN'S  
Patent.



1857.

Re  
GREEN'S  
Patent.

A purchaser would say, "here is an entry of an assignment to a purchaser for valuable consideration without notice, and I am purchasing not a patent but a Chancery suit."

I have no doubt that there is a sufficient case to entitle the Applicants to the order to expunge the entry. I will consider the costs.

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The MASTER of the ROLLS made the order with costs.

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## BLANDY v. KIMBER.

April 21, 22.

Notwithstanding payment for twenty-three years, by a widow, of the interest on a void mortgage, created by her while *coverte*, it was held that her representatives were not precluded from disputing its validity.

PRIOR to the month of *November*, 1803, *Richard Kimber* and *Sarah* his wife had duly mortgaged a freehold house at *Reading* to *John Blandy*, for securing 250*l.*; the equity of redemption in the premises stood limited to such uses as *Richard Kimber* and *Sarah* his wife should by deed, *attested by two witnesses*, appoint, and in default, as the survivor should by deed or will attested, &c. appoint, and in default to the use of *Richard Kimber* for life, with remainder to his wife for life, and after the death of the survivor of them, to the use of the right heirs of such survivor for ever.

By an indenture, dated the 3rd of *November*, 1803, but attested by one witness only, *Richard Kimber* and *Sarah* his wife, in consideration of a further sum of 50*l.* paid to them, purported to mortgage the property to *John Blandy* for an additional 50*l.*, by the execution of the joint power.

It

It was also alleged, that some time previous to the death of *John Blandy*, there was an arrear of interest amounting to 60*l.*, which the mortgagee, at the request of the mortgagors, consented to capitalize, and thenceforward interest was paid on the aggregate sum of 360*l.*, but there was no deed or writing evidencing the agreement.

1857.

BLANDY  
v.  
KIMBER.

*Richard Kimber* died in 1829, and *Sarah* his wife died in 1854, having devised the property to the Defendants. During the life of the widow, interest on the whole sum, 360*l.*, was paid to the mortgagee by her son *Samuel Hill Kimber* down to 1852.

This bill was filed by the representative of the mortgagee against the devisees of the widow, and it prayed as follows :—

1. A declaration that the Plaintiff was entitled to a charge on the mortgaged premises for the whole of the principal sum of the 360*l.* and interest.

2. For the usual account, and for a decree for foreclosure.

Mr. *R. Palmer* and Mr. *Amphlett*, for the Plaintiff, referred to *Rolfe v. Chester* (a).

Mr. *Lloyd*, for the Defendants, argued, that the second charge of 50*l.*, made by a married woman, by an instrument not in conformity with her power, was, as against her, a mere nullity; and secondly, that the interest paid by her son, without (as he argued) the acquiescence of the widow, had no binding effect.

Mr.

(a) 20 *Beav.* 610.

1857.

Mr. *R. Palmer*, in reply.

BLANDY  
v.  
KIMBER.

*The MASTER of the ROLLS.*—I will dispose of this case to-morrow.

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April 22.

*The MASTER of the ROLLS.*

This bill is filed to enforce a mortgage security, and with respect to 250*l.*, there is no question. The only question relates to an additional sum of 50*l.* and to a sum of 60*l.*, which is said to be arrears of interest, agreed to be converted into capital.

With respect to the 50*l.*, it is charged by a deed, which is of no validity or effect against the estate of *Sarah Kimber*. The property was settled in a particular manner, and power was given to charge it by deed, attested by two witnesses. The charge of 250*l.* was made in accordance with the power of the parties, but those subsequent, *viz.*, the 50*l.* and 60*l.*, were not binding on *Sarah Kimber*.

Upon *Richard Kimber's* death in 1829, *Sarah Kimber* became absolutely entitled to the property, and she continued, by her son, to pay interest on the whole 360*l.*, from that time to shortly before her death, or for twenty-three years.

I am of opinion, that notwithstanding this continued payment, I cannot charge her estate with these principal sums. I do not think there is any evidence that she knew what she was about: it was, in fact, a payment made in her own wrong, by her son. There is no evidence of any agreement, and no deed to shew that  
the

the 60*l.* was converted into capital, and nothing to shew that she was at all cognizant of her rights. I think it was the duty of the person who advanced the money to see that it was properly secured, and although interest has been paid for this length of time, I cannot charge the Defendants. I thought that the Plaintiff was entitled to an inquiry, but on the evidence, as it stands, I think there is not sufficient to charge the Defendants.

1857.

BLANDY  
v.  
KIMBER.

I shall make an order in the terms of the second paragraph of the prayer of the bill.

## PAINE v. RYDER.

April 22.

May 27.

IN this case, *Anthony Ryder* was seised of two copyholds, called "*The Headways*" and "*The Well*," held for lives, of the manor of *Hallow*, in the County of *Worcester*, of which the Bishop was the lord. According to the custom of the manor, in cases of intestacy, the copyholds descended to the legal personal representative of the intestate as personal estate.

By agreement between the lord and the copyholders, waste lands of the manor were enclosed and allotted. Held, that the allotments taken by the copyholders were of freehold tenure.

On the 31st day of *May*, 1809, *Anthony Ryder* died intestate. He left a widow, *Mary* (afterwards the wife of *John Rouse*), a son, *Thomas*, and a daughter, *Mary*, the wife of *John Merrell*, who, accordingly were beneficially entitled to the copyholds between them, in equal undivided third parts. *Mary Rouse*, the widow, took out letters of administration to her husband, and entered into possession of the copyholds; and afterwards, *Thomas Ryder* entered into such possession, and remained in it till his death, in 1826.

A partition by parol and separate possession cannot be questioned after being acted on for more than twenty years.

In

1857.

PAINE  
v.  
RYDER.

In *August*, 1816, an agreement took place between the Bishop of *Worcester* and the copyholders, by which the common and waste lands of the manor were enclosed and allotted. Three allotments, viz., No. 28, being 2A. 0R. 30P.; No. 69, being 16P., and No. 70, being 35P., were made to *Thomas Ryder*, in respect of *Anthony Ryder's* copyholds; and one-third of each of these allotments was, therefore, properly to be appropriated to the share of each of the next of kin of *Anthony Ryder*. The first question which arose on this was, in what character these allotments attached to their interests.

The other question arose out of these additional circumstances:—On the 16th of *June*, 1826, *Thomas Ryder* died intestate, leaving the Defendant, *Anthony Ryder* the younger, his son and heir at law. *Ann*, his widow, *Anthony*, his son, and his six daughters, were his next of kin, and as such, they, according to the custom of the manor, were entitled to the beneficial interest in one-third of these copyholds. Letters of administration were granted to his widow, *Ann Ryder*.

*Mary Rouse*, the widow of *Anthony*, survived her second husband, and by her will, she gave the rents of her one-third of the copyhold estates equally to *Mary Merrell* and *Ann Ryder*, and after the death of the survivor, to be sold, and the proceeds to be divided, as directed in her will, in moieties between the children of *Mary Merrell* and the children of *Thomas Ryder*. She died on the 5th of *October*, 1840.

It appeared that an arrangement had been made in *September*, 1830, between *Mary Rouse*, *Mary Merrell* and *Ann Ryder*, by which *Ann Ryder*, the adminis-  
tratrix

tratrix of *Thomas Ryder*, took possession of *The Well* Estate, and of the allotment No. 28, called the *Hollow Common*, as belonging to it; and *Mary Merrell* took possession of *The Headways*, and the two allotments Nos. 69 and 70, as belonging to that estate, and accordingly they were so held until 1842, when, on *Anthony Ryder*, the younger, attaining twenty-one, he was, by his mother, put into possession of the allotment No. 28, called the *Hollow Common*, and had held it ever since; *Ann Ryder*, the widow, his mother, continuing to hold the original copyhold estate called *The Well*, and the property had been so held from that time.

1857.

PAINE  
v.  
RYDER.

In 1853, new lives were admitted of the copyholds, expressly in trust for the representative of *Anthony Ryder*, the original intestate.

The Plaintiff was the legal representative of *Anthony Ryder*, and she was also one of the daughters and next of kin of *Thomas Ryder*. She filed a bill for the administration of the estate of *Anthony Ryder* (including the copyhold estates and allotment), for an account of the rents of the copyhold and allotments, and of the money arising from the timber thereon, and for a sale or partition of the copyholds and allotments.

Mr. *R. Palmer* and Mr. *F. White* for the Plaintiff.

Mr. *Selwyn* and Mr. *Smythe* for *Reynolds*, the legal personal representative of Mrs. *Rouse*.

Mr. *Southgate* for *Ann Ryder*.

Mr. *Lloyd* and Mr. *Shapter* for *Anthony Ryder* the younger.

Mr.

1857.

Mr. *R. Palmer* in reply.

~  
PAINE  
v.  
RYDER.

*The MASTER of the ROLLS* reserved judgment.*May 27.**The MASTER of the ROLLS.*

There may be some question as to the validity of the agreement between the Bishop of *Worcester* (the lord of the manor) and the copyholders; but I think that no question of this description properly arises or can be urged in this suit, and I shall, therefore, for the purpose of the questions before me, consider the agreement as binding on everybody.

No account or distribution of the estate of *Anthony Ryder* seems to have taken place, and the Plaintiff is, in my opinion, entitled to such account in the usual way, subject to the observations I am about to make.

With respect to the arrangement which took place in *September, 1830*, this is positively sworn to by *Ann Ryder*, the only person now surviving, who was a party to it. This is stated in paragraph four of her answer, and no evidence is brought to rebut it, and, accordingly, I think that this arrangement and partition cannot now be disputed, having been acted upon since 1830, more than twenty years prior to the filing of this bill; and, assuming the account of the estate of *Anthony Ryder* to be taken, and that no portion of the copyholds are required for the payment of his debts now due, that this division must bind the persons claiming his estate. If there be any other property belonging to *Anthony Ryder*,

*Ryder*, it is not included in the division then made, and will have to be accounted for in favour of his next of kin in the usual manner.

1857.

PAINE  
v.  
RYDER.

The principal question raised relates to the allotment of the *Hollow Common*, of which Mrs. *Ann Ryder* was in possession till 1842, when she put her son, *Anthony Ryder*, into possession, since which time he has held it adversely, but not long enough to create a title against any person who may be entitled to the allotment. The question raised is, whether this allotment did not form part of the estate of *Anthony Ryder* the intestate, and whether, being allotted in respect of his copyholds, is not to be distributed, and does not descend in the same manner as the copyholds themselves, that is, to the next of kin; and even if it can be treated as the property of *Thomas Ryder*, whether it does not go to his next of kin like the copyholds. On the first point, I have already expressed my opinion, that the allotment formed no part of the estate of *Anthony Ryder*, but that they must be taken as allotments made to the three next of kin individually, and as incidental to their shares in *Anthony Ryder's* estate. With respect to the tenure of the allotments themselves, I am of opinion that they do not follow the copyholds, but that they are freehold estates in the hands of the allottees, and follow the rules applicable to such interests.

In *Doe d. Lowes v. Davidson* (a), where allotments were made by agreement, saving to the lord all the mines, royalties and privileges, in as ample a manner as the same were enjoyed within the ancient customary tenements, and the award followed the same words, which award was confirmed by an Act of Parliament,  
and

(a) 2 *Mau. & Sel.* 175.



1857.

PAINE  
v.  
RYDER.

and the Act itself followed the same words, saving to the lord all his rights and privileges, and declaring that the allotments should be held by the allottees to the same uses, for the same estates, and subject to the same limitations, as the land in respect of which the allotments were made were limited, it was decided by the Court of Queen's Bench, that the allotments were freehold; and it was stated by Lord *Ellenborough*, in giving judgment, that if it was the intention of the parties by this agreement to constitute an estate of a customary nature in these allotments, it was a thing which, by the law of the land, they were not competent to do. He refers to the cases and to the principles which establish that proposition; he then goes through the award and lays down the same doctrine; and going through the Act of Parliament, he does not find, in the words there contained, any intention to create such a customary estate, and he and the whole Court decided that the Act must contain express words to create a customary estate. Accordingly it was there held, that the allotments were devisable like freeholds, that they were not affected by the custom of the manor, by which no estates held of the manor could be devised by will.

This is confirmed by many other cases, and I consider, therefore, that from the time the allotment was made to *Thomas Ryder* in 1816, it must be treated as freehold; and that he held one-third in trust for *Mrs. Rouse* in fee, one-third in trust for *Ann Merrell* in fee, and the remaining third he took himself in fee, and that as he did not dispose of that third, it descended on his death to the Defendant *Anthony Ryder*, his son, as freehold estate in fee simple.

The division which took place in 1830 I consider  
binding,

binding, and it must be treated as a division between Mrs. *Ann Ryder*, and Mrs. *Mary Merrell*, and Mrs. *Mary Rouse*, and binding upon all persons claiming under them. It does not appear that she gave up her life estate. She was, therefore, entitled to one-third of each of the moieties apportioned, and which, after her death, passed by her will. Her will would, therefore, operate upon the one-third of the allotment 28, of which *Anthony Ryder* has been in the possession, and one-third of the allotments 69 & 70, of which *Mary Merrell* was put in possession; but if the division made in 1830 is binding on her devisees, then the children of *Mary Merrell* can only take the half of *Mary Rouse's* one-third, partitioned to *Mary Merrell*, and the children of *Thomas Ryder* the half of *Mary Rouse's* one-third, partitioned to *Ann Ryder*. This, however, is a question which does not properly arise in this suit, for it is not one to administer the estate of *Mary Rouse*, nor is it instituted by the Plaintiff claiming as devisee under that will, in which case a different defence might have been made, and different questions would have arisen. But treating it as a bill to administer *Anthony Ryder's* estate, I am of opinion that the bill fails altogether, so far as it prays any account of the rents or timber of the allotments; and that it fails so far as it prays an account of the rents of the copyhold, or of moneys arising from the sale of timber upon it, except for the purpose of paying creditors of *Anthony Ryder* the intestate; and it also fails as regards the prayer for the sale and partition of the copyholds and allotment.

The Plaintiff is entitled to a general account of the estate of *Anthony Ryder*, but not disturbing the division of his estate amongst the persons interested made in 1830, although it would not affect creditors of *Anthony*. All that, in this respect, I think that the  
Plaintiff

1857.

PAINE  
v.  
RYDER.

1857.

PAINE  
v.  
RYDER.

Plaintiff would be entitled to is, to direct an account to be taken of the debts, if any, of *Anthony Ryder*, the intestate, still remaining unpaid, and an account of his personal estate and effects coupled with a declaration that the allotment made in 1816, in respect of the copyhold of *Anthony Ryder*, deceased, formed no part of his personal estate; and with a further declaration that the division of his copyhold estates, made in 1830 by *Mary Rouse*, *Ann Ryder* and *Mary Merrell*, is binding on all persons claiming as next of kin of the said *Anthony Ryder*, and on all persons claiming by, through, or under the said *Mary Rouse*, *Ann Ryder* and *Mary Merrell*.

The fourth paragraph of the bill seeks an account of the estate of *Thomas Ryder*, only so far as it may be necessary for the purpose of the former part of the prayer; but as *Thomas Ryder* died in 1826, when *Mary Rouse*, the legal personal representative of *Anthony Ryder*, was alive, and as it must be assumed that he accounted to her, whose agent he was, for what he received of *Anthony's* estate, I think that after thirty years I cannot call on his representatives to account for any part of the estate of *Anthony* which may have been received by him, but of which his representatives cannot now prove the discharge. The bill, therefore, fails also in this respect. \*

The consequence is, that I must direct the account above specified, coupled with the declarations I have stated, and that, except so far as the bill prays such a general account of the estate of *Anthony Ryder*, the intestate, it must be dismissed with costs.

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1857.

BROWNE v. BUTTER.

THE testatrix died in 1825; she left three daughters, viz., *Emily*, *Susannah* and *Mary*. By her will she gave a fund, which consisted of 15,480*l.* £3 per Cents. and 275*l.* £3:10*s.* per Cents., to three trustees, upon trust to pay the income of one-third to each of her daughters for life, with remainder, as to one-third each, to their respective children. *Emily* married *Warwick Hunt*, *Susannah* married *Browne*, and *Mary* married *Woolridge*. Settlements were made on each of their marriages of their interest in the fund. The trustees of *Emily's* settlement were *Butter* and *Shea*, those of *Susannah* were *R. Hunt* (deceased) and *Warwick Hunt*, and those of *Mary*, were *W. C. Browne* and *Warwick Hunt*.

March 26.  
Under a will, a trustee held an aggregate fund in trust, as to one-third each for *A.*, *B.* and *C.* respectively for life, with remainder to their respective children. He, without any authority under the will, transferred one-third of the fund to the trustees of the respective settlements of *A.*, *B.* and *C.* The share of *B.* having been dissipated by her trustees, held that *B.'s* children were entitled to participate in *A.'s* third, which was still remaining in her trustees' hands.

*Warwick Hunt* induced *Coffin*, the surviving trustee of the testatrix's will, to transfer one-third of the fund to *Butter* and *Shea*, as trustees of *Emily's* settlement, one-third of the fund to *R. Hunt* (deceased) and himself, *Warwick Hunt*, as the trustees of *Susannah's* settlement, and one-third to *W. C. Browne* and himself, as trustees of *Mary's* settlement. *Warwick Hunt*, after the death of his co-trustee, *R. Hunt*, sold out and misapplied *Susannah's* one-third. He also, by means of a power of attorney obtained from his co-trustee, *W. C. Browne*, sold out and misapplied the one-third of *Mary* and then became insolvent.

The remaining third of *Emily* was safe. The children of *Susannah Browne* instituted this suit against the

1857.  
BROWNE  
v.  
BUTTER.

the three families, and their trustees and others. They alleged as follows:—The Plaintiffs are advised that all the transactions as to the transfer of the said stock by *Coffin*, hereinbefore mentioned, were breaches of trust, and that they are entitled to treat such transactions as altogether null, so far as they prejudice the Plaintiffs; and that the stock which has been transferred to, and is now standing in, the names of *Butter* and *Shea*, is part of the estate of the said testatrix, which they are entitled to recover for the joint benefit of themselves and the children of *Hunt*. The children of the said *Warwick Hunt* and *Emily* his wife raise some question as to whether the said stock transferred into the names of *Butter* and *Shea* has not been, in some manner, lawfully appropriated for their benefit. The Plaintiffs, however, are advised and insist that such is not the case.

The bill prayed,—1. That the trusts of the will of the testatrix, so far as the same remained unperformed, might be carried into execution under the direction of the Court, and, if necessary, that new trustees of the said will might be appointed.

2. That it might be declared, that the stock transferred into and now standing in the names of *Butter* and *Shea* formed part of the trust estate under the will of the testatrix, and that directions might be given for the transfer of such stock into Court, or to new trustees.

3. That the liabilities of the Defendants *Warwick Hunt* and *Browne*, in respect of the breaches of trust committed by them, might be declared.

Mr. *Selwyn* and Mr. *Southgate*, for the Plaintiff.

Mr. *Lloyd* and Mr. *Hobhouse*, for *Browne*.

Mr.

Mr. *R. Palmer* and Mr. *W. Forster*, for the children of *Hunt*.

1857.

  
BROWNE  
v.  
BUTTER.

Mr. *F. White*, for *Hunt's* trustees.

Mr. *Morris* and Mr. *Jessel*, for other parties.

*The MASTER of the ROLLS.*

This is a very unfortunate case, and one of some difficulty.

The trust fund was in the proper state of investment, in the name of *Coffin* and two deceased trustees; and on looking at the will of the testatrix, I find no power of appointing new trustees; if the surviving trustee had such a power, it would materially alter the case. But the surviving trustee holding this fund, in trust as to one-third for the daughter *Emily* for life, with remainder to her children; and ~~as~~ to the other two-thirds, on similar trusts for the other two daughters for life, with remainder to their children, has thought fit to transfer the several thirds into the names of the trustees of the settlements of the three daughters. Now, I do not see any power by which any portion of the trust funds could be properly severed, although three distinct trusts were afterwards created as to the several thirds. The question is, whether *Coffin*, the surviving trustee of the will of the testatrix, was justified in transferring any portion of the trust fund either to new trustees of the will, or to the trustees of the marriage settlements of the daughters? I am of opinion he was not; and according to the case of *Clough v. Bond* (a), if a trustee so deals with a trust fund as to allow a third party to obtain

(a) 3 *Myl. & Cr.* 490.

1857.

BROWNE

v.

BUTTER.

obtain the control over it, whereby it is afterwards lost, he becomes liable for a breach of trust, by acting beyond the scope of his authority.

I have received no satisfactory answer to this simple question: Suppose that shortly after one-third of the fund had been transferred by *Coffin* to the trustees of *Emily's* settlement, the present Plaintiffs had come and insisted on its being re-transferred into the name of the trustee of the will, on this ground:—that if any part of the fund which had been transferred should be lost, the *cestuis que trust* under the settlement of *Emily*, who had not acquiesced in the transfer, might require a share of the funds then still remaining in the hands of the trustee of the will: What answer would there be to such a demand?

So, if the case had been reversed, and the one-third of the fund transferred to the trustee of *Emily's* settlement had been dissipated, and her children had asked to have their proportion of the fund still remaining in the hands of the trustee of the will, I do not see what answer there would be to their claim. There would have been a breach of trust on the part of the trustee of the will, who was not justified in delegating to other persons the trust which had been reposed in him alone. That being a breach of trust, it is needless to inquire whether it was a greater or less breach of trust than a sale of stock by the trustee of the will for his own benefit. If it had been sold, the children of *Emily* would have been entitled to a portion of fund remaining, as if it had been untouched; and if so, the children of *Susannah* are now equally entitled.

I am of opinion, I must make an order that these  
funds

funds be transferred to the credit of the cause, on the trusts of the will, so far as they are unperformed.

It is only necessary to say, that when *Coffin* transferred the fund to the trustees of the several settlements, he committed a breach of trust, and that the degree of breach of trust, more or less, does not affect the question.

1857.

*BROWNE*  
v.  
*BUTTER.*

CAVENDISH v. GEAVES.

April 23, 24.

May 28.

THIS was a suit instituted by General *Cavendish*, to establish a right of set-off against the trustees of the marriage settlement of Mrs. *Fitzgerald* and against Mrs. *Gore*. The Plaintiff owed two sums of money, which were secured by two bonds, to the firm of *Snow, Paul & Co*. One of these bonds was assigned to the trustees

Principles stated as to the right of set-off, where a bond is given by a customer to his bankers, in the following different instances,—1st, where the firm remains un-

altered; 2nd, where it is changed; 3rd, where the bond is assigned to the new firm; 4th, where it is assigned to a stranger; 5th, where notice of the assignment is given; and 6th, where it is omitted to be given.

If a customer borrows money from his bankers, and gives a bond to secure it, and afterwards, on his general banking account, a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond exists, both at law and in equity.

If the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if, after this, a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the *chose in action* would be inoperative at law, and the obligees of the bond, and the debtor on the general account, would be different persons; but as, in equity, the persons entitled to the bond, and the debtors on the general account, would be the same persons, a right of set-off would exist in this Court, and the customer would, in equity, be entitled to set off the balance due to him against the bond debt due from him.

If, after the bond had been given, it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter of account were brought here, as the assignees of the *chose in action* would be bound by the equities affecting their assignors.

But if notice of that assignment had been given to the original debtor, no right of



1857. trustees of Mrs. *Fitzgerald's* marriage settlement, and the other to Mrs. *Gore*. On the failure of the firm, a balance of 1,500*l.* was due to the Plaintiff, and he sought to set off this sum against the sums due from him on these bonds.

CAVENDISH  
v.  
GEAVES.

The facts of the case were these :—

On the 4th of *November*, 1830, the Plaintiff borrowed 3,000*l.* from the firm of *Snow and Paul*, which then consisted of *Robert Snow* and Sir *John Paul* (the father), and he gave a bond to them for that amount. On the same day he borrowed 5,000*l.*, and he gave a second bond to them for that amount, making altogether two bonds, to secure one sum of 8,000*l.*

In 1832 the firm was altered, and it then consisted of *Robert Snow*, Sir *John Paul*, and *Robert Snow* the younger, *John Dean Paul*, and Mr. *Strahan*.

In 1836 the elder Mr. *Snow* retired, and the firm then consisted

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set-off would exist, in this Court, for the balance subsequently due from the bankers to the obligor, because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account, with whom he had continued to deal.

If the assignment of the bond had been made to the new firm, with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

If, after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity, as against the first assignees, of whose assignment he had notice; and the second assignees would, in equity, be bound by it, because the assignees of the bond take it subject to all the equities which affect the assignors.

A change of the title of the firm in a banker's pass book, and entries therein to the credit of the new firm of the interest of securities given by the customer to the original firm, held to be notice of the assignment to the new firm of the securities given by the customer to the old firm.

Bankers, to whom a customer had given a bond, assigned it over to third parties, who gave no notice to the obligor. Held, that notwithstanding the assignment, the customer's right continued, of setting off moneys due to him from his bankers against the bond.

consisted of the two *Pauls* and *Strahan*, and *Snow* the younger.

1857.

CAVENDISH  
v.  
GRAVES.

In 1841 *Snow* the younger retired, and the firm consisted of the two *Pauls*, *Strahan* and *Bates*.

At every change of the firm, the securities held by the bankers were assigned to their successors, and amongst them, the bonds of the Plaintiff were assigned to the successive persons constituting the partnership.

No further change took place in the firm until their bankruptcy in *June*, 1855, except that in 1852 Sir *John Paul* died, and his son became Sir *John Dean Paul*.

In *February*, 1841, the firm advanced 500*l.* to the Plaintiff, which in *June*, 1841, was repaid by him.

On the 9th of *September*, 1843, the firm advanced a sum of 1,500*l.* to the Plaintiff, and took his promissory note for the amount, payable at four months after the date thereof. Interest was duly paid on all the money due from the Plaintiff down to *September*, 1847, and to this time, the firm had done nothing with the bonds or the note; they remained the sole holders, and were the only persons making any claim against the Plaintiff in respect thereof.

On the 14th of *September*, 1847, the firm (then consisting of the two *Pauls*, *Strahan* and *Bates*) assigned the bond for 3,000*l.* to Lord *Alvanley* and Sir *John Dean Paul* (the trustees of Mrs. *Fitzgerald's* settlement), to secure a like amount belonging to the trustees of that settlement, which had been sold out by Sir  
John

1857.  
CAVENDISH  
v.  
GEAVES.

*John Dean Paul*, one of the trustees. On the same day a similar assignment of the second bond was made to *Mrs. Gore*, to secure 5,000*l.*, money belonging to her, which had been taken by or on behalf of the firm.

No notice of either of these assignments was given to the Plaintiff, the obligor, until *October*, 1855, after the bankruptcy of the firm.

In *November*, 1848, the Plaintiff paid 1,000*l.* into the firm, to be applied in part discharge of his debt, and this sum was accordingly applied in part discharge of the amount then due.

In *May*, 1851, another sum of 1,000*l.* was advanced by the firm to the Plaintiff, but for which no fresh security was given.

In *January*, 1852, *Sir John Paul*, who had survived *Snow* the elder, died, and the firm then consisted of *Sir John Dean Paul*, the son, *Mr. Strahan* and *Mr. Bates*.

In *May*, 1852, the Plaintiff paid 500*l.* in further part discharge of the debt due from him, and proper entries of these payments and receipts were made in the books of the firm. These matters continued without any change till *June*, 1855, when the failure of the house took place. Shortly before their stoppage took place, the Plaintiff's promissory note for 1,500*l.* was indorsed over to *Mrs. Gore*, and delivered to her. At this time, besides the two bonds (amounting together to 8,000*l.*), the Plaintiff owed to the firm 1,000*l.*, for which no security existed, unless the promissory note was an existing security for that purpose, and a balance of 1,505*l.* 1*s.* 5*d.* was due to the Plaintiff from the firm on  
his

his general banking account. On these facts, the question was whether the Plaintiff was entitled to set off the sum of 1,505*l.* 1*s.* 5*d.*, which was due to the Plaintiff from the firm on his general banking account, against the 9,000*l.*, or against any part of it. If he was entitled to set off 1,000*l.* of it against the 1,000*l.* advanced by the firm to him on simple contract in 1851, the question would then resolve itself into this :—whether, so far as regards the balance of 500*l.*, he was entitled to set off that amount as against the money due on the bonds.

1857.  
  
 CAVENDISH  
 v.  
 GRAVER.

Mr. *Follett* and Mr. *T. Stevens*, for the Plaintiff. The Plaintiff has a right to set off the balance due to him from the firm against the amount due from him on the bonds and promissory note. The right of set-off existed in equity independently of the Statute. It exists in all cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand; *Rawson v. Samuel* (a): and where there are cross demands, which, if legal, would be the subject of set-off at law, they will be set off in equity if one be equitable; *Clark v. Cort* (b); *Jones v. Mossop* (c). At law, a debt due to a Defendant, as a surviving partner, may be set off against a demand on him in his own right; *Slipper v. Stidstone* (d); *French v. Andrade* (e). The converse is equally true, and the same right exists in equity. If, then, before the bankruptcy, the banking firm had sued the Plaintiff on the bond at law, there would have been a clear right of set-off in equity.

The question, then, is, was this right of set-off affected by the assignments of the bonds to the trustees of Mrs.

*Fitzgerald's*

(a) 1 *Cr. & Phil.* 178.

(b) 1 *Cr. & Phil.* 154.

(c) 3 *Hare*, 568.

(d) 5 *Term Rep.* 493.

(e) 6 *Term Rep.* 582.

1857.  
  
 CAVENDISH  
 v.  
 GEAVES.

*Fitzgerald's* settlement and to Mrs. Gore? Clearly not, for, first, the legal right never passed to them by the assignments, the bonds being mere *choses in action*, not assignable at law, and the assignees therefore taking subject to all the equities affecting the assignors; *Priddy v. Rose (a)*. The legal interest vested in Sir John Paul, the father, by survivorship, and is now in his executors, and never passed to the Defendants.

Secondly. No notice of the assignments was given to the Plaintiff until after the bankruptcy. The Plaintiff was, therefore, unaffected by the assignments, and was justified in continuing his dealings with the firm on the same footing as if no assignment had taken place. Not only had the Plaintiff no notice of the assignments to the Defendants, but the entries, made by the banking firm in their books, affirmed the contrary, viz., that the bonds belonged to the successive firms, and in the Plaintiff's pass-book interest was regularly debited against the Plaintiff as paid to the several firms; these gave him notice of the changes, from time to time, in the beneficial ownership of the bonds, and that they had been transferred to the successive firms on every change which occurred. If the Plaintiff had paid the amount of the bonds to his bankers it would have been a valid discharge to him, and such payment would have been valid as against the Defendants; therefore a set-off, which is a partial payment, must stand in the same position. It has been held, that when no notice is given to the obligor of the assignment of a bond, and an action is brought on the bond against the obligor, he may discharge it, by way of set-off, in respect of any dealings with the obligee without notice of the assignment; *Ex parte Monro (b)*. So in the case of a mortgage, the principle

(a) 3 Mer. 86.

(b) Buck. 303.

principle is, that as against an assignee without notice, the mortgagor has the same right as he has against the mortgagee, and whatever he can claim, in the way of set-off or mutual credit, as against the mortgagee, he can claim against the assignee; *Norrish v. Marshall* (a). They also relied on *Mangles v. Dixon* (b).

1857.  
  
 CAVENDISH  
 v.  
 GEAVES.

Mr. *Hardy*, for the assignees of the bankers, asked for his costs.

Mr. *Lloyd* and Mr. *Haynes*, for the trustees of Mrs. *Fitzgerald's* settlement. If the trustees neglected to give notice of the assignment, so did the banking firms, who were themselves mere assignees of the bonds, and the rights of all parties are merely equitable. The pass-books gave no notice of the change of ownership of the bonds, for interest was only debited in the Plaintiff's account as a payment to the bankers, without stating in what right or for whom they received it. They were the bankers and agents of the trustees, and were therefore entitled to receive the interest of the bond; and Sir *John Dean Paul* was himself one of the trustees of Mrs. *Fitzgerald's* settlement. If the pass-book did intimate a change in the beneficial ownership, the Plaintiff was bound to look into the matter; his only equity is to be protected against any payments made by him in discharge of the bond, in ignorance of the Defendant's rights, but none have been made. It is admitted, that at law the Plaintiff has no right of set-off; neither has he in equity; for the mere existence of cross demands is not sufficient; *Rawson v. Samuel* (c); *Cherry v. Boulbee* (d); and to entitle a party to set off, the demands must be in the same right; *Downham v. Matthews*;

(a) 5 *Madd.* 475.

(b) 3 *H. L. Cas.* 702.

(c) 1 *Cr. & Phil.* 178.

(d) 4 *Myl. & Cr.* 442.

1857. *Matthews* (a); *Whitaker v. Rush* (b); *Freeman v. Lomas* (c); *Chapman v. Derby* (d).  
 CAVENDISH  
 v.  
 GRAVES.

Lastly, the point in question was decided by the Lords Justices in *Ex parte Greaves* (e). [They also referred to *Hill v. Caillovel* (f).]

Mr. *R. Palmer* and Mr. *Baggalay*, for Mrs. *Gore*. The right of set-off is a passive right, but here the Plaintiff comes into equity to enforce it actively, which he has no right to do. Sir *John Paul*, the father, was the sole legal owner of the bond for 5,000*l.*, and he was the sole trustee of Mrs. *Gore's* marriage settlement; he has assigned over this bond and indorsed over the promissory note to the trustee of the settlement. As to the note, there can be no question, for the legal interest in it passed by the indorsement; and as to the bond, the legal owner is a trustee for Mrs. *Gore*. The privilege of set-off only exists where the demands are in the same right, but here neither Mrs. *Gore* nor her trustee is a debtor to the Plaintiff; the attempt is to set off a debt due from A. to B. against another due to A. from C. There is no mutuality, for if the balance had been the other way, the bankers could not have set off a debt due from the firm to the Plaintiff, against the amount due from the Plaintiff on the bond to one of them, as trustee. If the Plaintiff had become bankrupt, and his balance at the bankers' had exceeded the amount of the bond, it could not have been set off.

The successive firms of bankers were not the legal owners of the bonds, and though a series of assignments to them is alleged, to support the Plaintiff's case, they have

(a) *Prec. Ch.* 580.  
 (b) *Amb.* 407.  
 (c) 9 *Hare*, 109.

(d) 2 *Vern.* 117.  
 (e) 2 *Jur. (N. S.)* 651.  
 (f) 1 *Ves. sen.* 122.

have not been proved, and no notice of them was ever given the Plaintiff; but there is an actual assignment of the bond from all the firm to Mrs. Gore, which has been proved. The bankers' books prove nothing as against the Defendants; the bankers were the agents of a great number of persons, and authorized to receive their interest, and they were also the agents to receive the assets of the previous firms, and apply them in the manner arranged. The entries prove nothing more than this: that the bankers have paid the amount of the interest, on behalf of the customer, and have debited his account with the amount; or that they, being authorized to receive, have received the interest; but in what character or right the receipts were made the entries were silent, and they do not amount to notice of any assignment. [*The Master of the Rolls*. The legal owner of the bond, who was the person entitled to sue at law, was always a partner in the firm. The difficulty I have felt is, whether the entries in the pass-books do not amount to statements by him to General Cavendish, that the interest had been paid to the firm, and not to the legal owner himself, and whether he did not thereby sanction the payment of interest on the bonds to persons other than himself.]

1857.  
CAVENDISH  
v.  
GEAVES.

The bonds are kept separate in the books, and at one time the rate of interest on Mrs. Gore's bond was raised from 4½l. to 5l. per cent.; this was inconsistent with their both belonging to the same firm. When the set-off took place, Sir John Dean Paul had ceased to have any right to make any appropriation; *Watts v. Christie* (a).

There is a great distinction between a person having  
a sweeping

(a) 11 *Beav.* 546.



1857.  
  
 CAVENDISH  
 v.  
 GRAVES.

a sweeping right as that of set-off, and one who, like the Defendant, has entered into a special contract for a specific right; the latter has always a superior equity; *Beavan* v. The Earl of *Oxford* (a); *Whitworth* v. *Gaugain* (b); *Kinderley* v. *Jervis* (c); *Bearcliff* v. *Dorrington* (d).

This case has been decided by the Lords Justices, in the absence of the Plaintiff, we admit, but still the decision on reputed ownership governs this question of equitable assignment, both of which depend on notice of the assignments of the bonds; *Ex parte Greaves* (e).

Mr. *Follett*, in reply. The Defendants knew that the Plaintiff was the obligor of the bonds, and it was their bounden duty, on the assignment being executed, to give him notice; by their laches in perfecting their securities, all the rights of the obligor of the bonds were allowed to continue down to the bankruptcy. There are two questions, first, whether General *Cavendish* had notice of the assignments from the old firms to the new; and secondly, if he had that notice, but no notice of the assignments to the Defendants (which is admitted), the right of set-off still exists. The books shew the payment of interest to the successive firms, therefore we have the admission of the legal owners, from time to time, of the right of the successive firms to receive the interest. What is notice but this, that some one, other than the legal owners, has a right to the money, and here they are specified in the pass-books by the titles of the successive firms.

The question before the Lords Justices was one of  
 reputed

(a) 6 *De G., M. & G.* 492.  
 (b) 3 *Hare*, 416.  
 (c) 22 *Beav.* 1.

(d) 4 *De G. & Sm.* 122.  
 (e) 2 *Jur. N. S.* 651.

reputed ownership, and between different parties, and the books of the firm, which prove the notice of the assignments, was not before them.

1857.  
  
 CAVENDISH  
 v.  
 GRAVES.

As to the promissory note, it was payable at four months, and the indorsement was made in 1847, after it had become due, and the indorsee, therefore, took it subject to all equities as between the drawers and acceptor; *Tinson v. Francis* (a). As to the costs of the bankrupt's assignees, *Ford v. The Earl of Chesterfield* (b).

*The MASTER of the ROLLS.* I will consider this case.

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*The MASTER of the ROLLS.*

May 28.

The question in this suit is one of considerable importance, and as, in my opinion, the principles which govern this case are not liable to doubt, the result must depend on the facts of the case as established by the evidence in the cause.

Before I proceed to examine this evidence, which must be done with some minuteness, I shall state what I consider to be the principles which regulate the case, and I will then examine the evidence, in order to see how far it establishes or fails in establishing the claim of either party.

If a customer borrow money from his bankers, and give a bond to secure it, and afterwards, on the balance of his general banking account a balance is due to the  
 customer

(a) 1 *Campb. N. P. C.* 19.

(b) 16 *Beav.* 516.

1857.  
CAVENDISH  
v.  
GRAVES.

customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

If the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the *chose in action* would be inoperative at law, and the obligees of the bond and the debtor on the general account would be different persons, but as, in equity, the persons entitled to the bond, and the debtors on the general account, would be the same persons, a right of set-off would exist in this Court, and the customer would, in equity, be entitled to set off the balance due to him against the bond debt due from him.

If after the bond had been given it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter of account were brought here, as the assignees of the *chose in action* would be bound by the equities affecting their assignors.

But if notice of that assignment had been given to the original debtor, no right of set-off would exist in this Court, for the balance subsequently due by the bankers to the obligor; because the persons entitled to  
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the bond would, as the obligor knew, be different persons from the debtors to him on the general account, with whom he had continued to deal.

1857.

CAVENDISH  
v.  
GEAVES.

If the assignment of the bond had been made to the new firm, with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

If after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors.

I think it desirable to state these propositions in the first instance, both because it is best that it should be clearly understood on what principles I decide this case, and also because, though these principles were not denied by the Defendants, yet several arguments were addressed to me which are not wholly consistent with them, and which I am desirous of disposing of in the first instance. For instance, it was urged that Mrs. *Fitzgerald's* trustees and Mrs. *Gore*, neither at law or in equity, owed anything to the Plaintiff, and that therefore there could be no set-off as against them. The answer to which is, that, if they took the bonds subject to the equities which affected the assignors, they stood, for this purpose, in the place of the assignors, and whatever could be set off against the assignors

1857.  
  
 CAVENDISH  
 v.  
 GRAVES.

assignors could be set off against the assignees, bound by the same equities and standing in their shoes. The facts of the case are these—[*His Honor stated them as above, and proceeded:*]—

On these facts, the question is, whether the Plaintiff is entitled to set off the sum of 1,505*l.* 1*s.* 5*d.* against the 9,000*l.*, or against any part of it. If he is entitled to set off 1,000*l.* of it against the 1,000*l.* advanced by the firm to him on simple contract, in 1851, the question would resolve itself into whether, so far as regards the balance of 500*l.*, he is entitled to set off that amount as against the money due on the bonds.

With respect to the first question, the view I take of the case is this:—When in *November*, 1848, the Plaintiff paid 1,000*l.* to the firm, to be applied generally in part discharge of his debt, and which was so applied by the bankers, I think that it must be taken to have been applied in part discharge of what was due on the promissory note; and if so, the consequence would be, that after that payment, only 500*l.* was due on the promissory note. The promissory note could not be made a security for the 1,000*l.* afterwards advanced to the Plaintiff in *May*, 1851, because it is not expressed to be made for the purpose of securing further advances. I think, also, that when the Plaintiff, in *May*, 1852, paid the further sum of 500*l.*, in part discharge of what was due from him, that must be applied in discharge of the earlier debt, viz., that due on the note, according to the principle of *Clayton's Case in Devaynes v. Noble* (a). If this be correct, the consequence will be, that in *June*, 1852, nothing was due on that note.

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(a) 1 *Merivale*, 572.

At the same time, it is but proper to observe, that the note was never cancelled, and that it was afterwards indorsed to Mrs. Gore; still, as the note was not payable on demand, but at four months date, and was indorsed over to that lady when it was over due, she took it subject to all equities that attached to it. Nor can I think that anybody could attach much value to the indorsement of the note given nearly twelve years before, and which was due eleven years and a half before it was indorsed over: it is admitted also that no notice of this indorsement was given to the debtor, the Plaintiff.

1857.  
  
 CAVENDISH  
 v.  
 GEAVES.

In my opinion, therefore, apart from any question on the bond, the case stands thus:—In *May*, 1851, the firm of the two *Pauls, Strahan* and *Bates* advanced to the Plaintiff 1,000*l.*, being also debtors by specialty for 8,000*l.*, and by simple contract for 500*l.* In *May* of the following year, the Plaintiff paid them a sum of 500*l.*, which must be applied in discharge of the former simple contract debt of 500*l.*, and, independently of the specialty debt, he owed the firm 1,000*l.* on simple contract for money advanced to him after the assignments of the bonds to the Defendants, and not secured by their bond. When the firm failed, he was a creditor of that same firm on his general account for 1,505*l.* I think that both at law and in equity the Plaintiff is entitled to set off 1,000*l.*, part of the balance due to him, against this 1,000*l.* due from him to the firm on the advance made in *May*, 1851. This particular debt of 1,000*l.* was never assigned to the trustees of Mrs. *Fitzgerald's* marriage settlement or to Mrs. *Gore*, and it was not, in my opinion, secured by the promissory note. No one made or could make any claim to it either at law or in equity in respect of it against General *Cavendish*, except the bankers, and they owed 1,500*l.* to him,

VOL. XXIV. N the

1857.  
CAVENDISH  
v.  
GRAVES.

the debtor and creditor are the same, and the debt is of the same character. I think the right of set-off in respect of this complete, and that the question respecting the right of set-off against the money due on the bond only affects the 500*l.*, the balance of the general account.

This question, as I stated at the outset, must, in my opinion, depend upon whether the Plaintiff had distinct notice of the assignment of the bond to the several and successive partners constituting the firm with which he banked. If he had, and if he treated them as the owners, in equity, of the bond given by him to Mr. *Snow* and Sir *John Paul*, and as such paid them the interest on the bonds, and if, besides this, he had no notice of any assignment of the bond by them to other persons, then I am of opinion that as against the firm, and as against all persons claiming through them, he is entitled to set off the balance due to him by simple contract against the debt due from him on specialty; and further, that if this be so, the assignees of the bonds from the firm, having given no notice of the assignment to the obligor, are bound by the equities which bound the assignors, and are compellable to allow this set-off.

On this question of notice of the assignment to the successive partners, it is admitted that no notice was given to the Plaintiff other than such notice, if any, as appears from entries in his pass book, which passed between him and the firms. Three of those pass books are produced, the first begins in *January*, 1836, but the prior pass books are of no importance, because no change took place in the partners constituting the firm from the date of the bond until after *January*, 1836, when the elder Mr. *Snow* retired. These three pass books extend from the 1st *January*, 1836, down to the  
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the stoppage of the firm. The first is entitled "The Honourable *Henry Frederick Compton Cavendish* in account with Messrs. *Snow, Strahan and Pauls*." This, therefore, contains information to the Plaintiff, that the firm consisted of *Snow, Strahan* and the two *Pauls*. On the 30th of *June* there is an item by which the Plaintiff is debited in account with the payment of interest for six months on 8,000*l.* to *Snow & Co.*, at 4*l.* 10*s.* per cent. per annum. A similar entry occurs at the end of *December* in that year; a similar entry "to *Snow & Co.*, six months' interest on 8,000*l.*" occurs on the 30th *June*, 1837, and on the 30th *December*, 1837. The entries for interest are in the same words and at the same time for 1838 and in 1839, till *December*, 1839, when the interest appears to have been raised to 5*l.* per cent.; but this pass book contains no notice of the alterations of the firm, by the retirement of the elder Mr. *Snow*. The entries continue the same down to the close of the year 1841, when the first pass book ends and a new pass book begins. In this new pass book the title of the account is the Plaintiff "in account with Messrs. *Strahan, Pauls* and *Bates*," giving him information that the firm then consisted of Mr. *Strahan*, the two *Pauls* and Mr. *Bates*. In this account there is no entry of payment of interest in *June*, but on the 30th *December*, 1842, is the following entry: "*Strahan & Co.* on 8,000*l.*, 194*l.* 3*s.* 4*d.*," that is, the interest for six months, less income tax; and immediately after follow two items, one of which is this, "Omitted, *June* 30th, *Strahan & Co.* on 8,000*l.*, 200*l.*" This is, in my opinion, a distinct notice to the Plaintiff that the interest paid by him heretofore on the two bonds to *Snow & Co.* were now paid by the firm to *Strahan & Co.*; and it is important to observe, that one of the obligees of the two bonds was still a partner in the new firm. The same entries continue through this

1857.

CAVENDISH  
v.  
GRAVES.



1857.  
  
 CAVENDISH  
 v.  
 GRAVES.

book, with the exception that the interest is reduced to 4l. 10s. per cent., and with this addition, that immediately following it, after *September*, 1843, the pass book contains entries of payment of the interest on the 1,500l. advanced by the firm. This continues down to the middle of *June*, 1847. The third and last pass book begins with 24th of *June*, 1847. It is entitled like the former, "The Honourable *Henry Frederick Compton Cavendish* in account with *Strahan, Pauls and Bates*." On the 30th of *June*, 1847, is the entry, on the debit side of the account, of "*Strahan & Co.*, six months,' 230l. 11s. 6d.," the interest on the two sums, both the bonds and the simple contract debt of 1,500l., being united together.

In *December*, 1847, is the first entry after the assignment of the bonds to the Defendants, the amounts are separated, the interest on the 3,000l. being one item, and the other being interest on 6,500l., thus uniting the simple contract debt to the bond for 5,000l.; but interest on both is expressed to be paid to *Strahan & Co.* The same course is adopted in the entries on 1st of *July*, 1848. On the 27th *November* in that year is an entry, on the debit side, "*Strahan & Co.*, principal and interest, 1,020l. 10s. 11d." This is the 1,000l. I mentioned to have been paid off. Accordingly, the next entry of the payment of interest is on the 30th *December*, 1848, "*Strahan & Co.*, six months' on 5,500l. Ditto, ditto, six months' 3,000l." The same entries occur on the 29th *December*, 1849, the same in *June* and *December*, 1850, except that though the account of interest is the same, the principal sums are not mentioned. In *June*, 1851, besides the entries for interest, specifying the sums, viz., 5,500l. and 3,000l., is a third entry for interest on 1,000l. for fifty-five days,  
 being

being the sum I mentioned above as advanced by the firm in *May*, 1851.

1857.

CAVENDISH  
v.  
GEAVES.

In *December*, 1851, the entries are interest on the 3,000*l.*, and interest on 6,500*l.*

In *May*, 1852, is an entry of payment of principal and interest of 500*l.* by the Plaintiff to *Strahan & Co.*; and in *June* 30, and *July* 1, the entry of the payment of interest is on 3,000*l.* and on 6,000*l.*, and so is the same entry in *December*, 1852, in *July* and *December*, 1853, in *June* and *December*, 1854, which is the last entry in the book on this subject, as the bank stopped payment early in *June*, 1855.

I am of opinion, that these entries, in books so entitled are distinct notice to the Plaintiff, that *Strahan & Co.* were the holders of the bonds given to *Snow* and *Paul*, and entitled to receive the interest on them; and that if, after seeing and allowing to go unquestioned these entries in the pass book, the Plaintiff had privately paid the interest on the principal to the elder Mr. *Snow*, or to the executors of Sir *John Paul* (the surviving obligee of the bond), he could not successfully have contended, in equity, that this payment was a good discharge of the interest or the principal, as between himself and the firm of *Strahan & Co.* The payees of the interest are specified, and altered to correspond with the alteration in the style of the firm.

If the entry had been six months' on 3,000*l.* to Mrs. *Fitzgerald*, or to the trustees of her settlement, or six months' on 5,000*l.* to Mrs. *Gore*, I should have held the Plaintiff fixed with notice that the persons so named were entitled to receive the interest on the bonds, and, consequently, that the bonds had been assigned.

I consider

1857.  
CAVENDISH  
v.  
GREAVES.

I consider, then, the entries I have stated to be a notice to the Plaintiff, and acquiesced in by him, that the bonds had been assigned to the successive firms. I do not consider the separation of the 8,000*l.* into two sums, of 3,000*l.* and 5,000*l.*, as any notice that persons other than *Strahan & Co.* were entitled to receive the interest, the more especially as the capital of the further advances made by the firm were united to the capital of one of the bonds. In this state of the case, I am of opinion, that if the Plaintiff had paid to *Strahan & Co.* the 8,000*l.*, this would have been a good discharge of his liability on the bonds, as against all assignees of whom the Plaintiff had no notice. If so, it appears to me to follow, that the right of set-off stands exactly in the same situation. Neither the trustees, nor the *cestuis que trust* of Mrs. *Fitzgerald's* settlement, nor Mrs. *Gore*, have thought fit to give General *Cavendish* notice of the assignment of the bond under which they claim. They must, therefore, stand in exactly the same situation as their assignor, so far as regards the Plaintiff; and, as between the Plaintiff and the firm, I am of opinion, that the right of set-off exists to the extent claimed by the Plaintiff. Were I to hold otherwise, I must, in my opinion, necessarily hold, that in taking the account, General *Cavendish* could not be allowed any of the payments of interest made to the firm and not accounted for to the Defendant; and that if the assignees of the bonds had not received interest on the bonds, they would be entitled to claim it to the extent not barred by the Statute of Limitations.

The only additional matter which I have to consider is the decision of the Lords Justices in the case of *Ex parte Greaves In re Strahan(a)*, which it is contended

(a) 2 *Jur. N. S.* 651.

tended has decided the very point now before me, in the same matter, in an opposite manner to that which I have expressed to be my opinion. But upon reading and carefully considering that case, I do not apprehend this to be so; if it were, I should of course implicitly follow that decision; but as I look on the two cases, I not only see a great difference between the evidence before me and that before their Lordships, but, which is of more importance, the questions are quite distinct; and it may well be that these bonds were not in the order and disposition of the bankrupts, as the reputed owners thereof, and yet that the assignees of them are bound by the same equities of set-off, as against the Plaintiff, which would have attached in case the bankrupts had been the persons beneficially interested in the bonds.

1857.

CAVENDISH  
v.  
GRAVES.

Upon the whole consideration of this matter, I think that the facts of the case bring it within those principles on which I stated at the outset my opinion to be, that these questions of set-off depend; and I think that the assignees of these bonds must stand in exactly the same situation as the assignors; and that the assignors, being the firm or members of the firm, and the assignment being for money advanced to the firm, as between themselves and the Plaintiff, the assignees stand in the same situation in equity as they would have done if the original firm had continued unchanged to the present time; in which case, if I am correct, the right of set-off would have existed at law, and could not have been disputed here.

My opinion, therefore, is, that the Plaintiff is entitled to set off the balance of his account, in the first place, against the 1,000*l.* advanced to him by the firm in *May*,  
1851;

1857.  
CAVENDISH  
v.  
GEAVES.

1851; and, secondly, any balance that may remain due to him over and above that sum, against the amount due from him on the security of the two bonds in question. The way in which this will be worked out practically will be, that the 1,000*l.* of the balance will be set off against the 1,000*l.* advanced by the firm to the Plaintiff in *May*, 1851, and that the 505*l.* remaining will be set off against the two bonds, and be apportioned as against each, according to their respective amounts. This is assuming that all interest to be paid, the account of interest may vary the amounts but not the principle. I am of opinion, that General *Cavendish* is entitled to a decree accordingly, making such declaration; and that he is also entitled to the costs of the suit up to the hearing, which has been occasioned by the resistance to this claim. If my decree stands, it can scarcely be necessary to take the account, but on the payments being verified by affidavit, a decree might be taken for the payment at once.

With respect to the costs of the assignees, I think that the Plaintiff must pay these costs. They were made Defendants, and the suit prosecuted against them, after it was known that they disclaimed all interest in these bonds and in the promissory note.

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1857.

## GULLY v. CREGOE.

Feb. 16, 17.

March 12.

THE testator expressed himself as follows:—"I also give, devise and bequeath unto my dear wife, *Maria Josephine Gully*, all my property of every nature, sort, kind and description whatsoever, and wheresoever situate, whether real, freehold, copyhold, leasehold, or chattel, money, and securities for money, as, to and for *her own sole use and benefit for ever, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly and equitably amongst my two daughters and their children.* And I hereby nominate, constitute and appoint my said dear wife the sole executrix and residuary legatee of this my last will and testament."

The testator died in 1853, leaving his wife and his two daughters; one daughter had five children and the other three children.

The question was, whether this was a valid precatory trust, and what interests the several parties took.

Mr. *Amphlett*, for the Plaintiff, the wife.

Mr. *Wiglesworth*, for one daughter and children.

Mr. *G. A. F. Cavendish Bentinck*, for the other daughter.

*Meredith v. Heneage* (a); *Webb v. Wools* (b); *Ware v. Mallard* (c); *Knight v. Boughton* (d); *Reeves v. Baker* (e); *Green v. Marsden* (f), were cited.

The

(a) 1 Sim. 542.

(b) 2 Sim. (N. S.) 267.

(c) 16 Jur. 492.

(d) 12 Beav. 312, and 11 Cl.

&amp; Fin. 513.

(e) 18 Beav. 372.

(f) 1 Drew. 647.

The testator gave his residuary real and personal estate to his widow, "to and for her own sole use and benefit for ever, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly and equitably amongst my two daughters and their children," and he appointed her sole executrix and residuary legatee. Held, that the widow took beneficially for life, with remainder to the two daughters and their children, as she should appoint; but the Court refrained from declaring how the property would devolve in default of appointment.

1857.

GULLY  
v.  
CREGOE.

*The MASTER of the ROLLS* was of opinion that there was a clear precatory trust, that the widow was entitled to the property for her life, for her separate use, and that upon her death it would go to her two daughters and their children, as she should appoint; but he declined deciding how the parties would take *inter se* in default of appointment.

## PEARL v. DEACON.

June 4, 5, 9.

The Plaintiff was surety, upon a promissory note, to the Defendants, for a sum lent by them to their tenant; and the Defendants also took a mortgage of the tenant's furniture for the same debt. They afterwards, under a distress, took the same furniture for arrears of rent. Held, that, as regarded the Plaintiff, (the surety), the produce of the furniture was first applicable to the payment of the promissory note, and that the landlords could not, as against the surety, apply it in payment of the rent.

THE Defendants, Messrs. *Deacon*, brewers, of *Windsor*, agreed to let a public-house, called "*The Carpenters' Arms*," to *Pearson*, and to enable him to purchase the furniture, &c., of the outgoing tenant, they also agreed to lend him 250*l.* The Plaintiff *Pearl* became a surety for half that amount, and on the 16th of *November*, 1852, *Pearson*, and the Plaintiff *Pearl*, as his surety, gave the brewers a joint and several promissory note, payable on demand, for 125*l.* *Castles* was surety for the other moiety of the 250*l.*

On the 25th of *November*, 1852, *Pearson* assigned to the brewers a pension of 18*l.* per annum, payable during his life, and the goods, chattels and effects in *The Carpenters' Arms*, subject to redemption, on payment of the 250*l.* and interest on the 16th of *November*, 1858, or at such earlier or other time as the brewers, &c. should appoint for the payment thereof, in and by a notice in writing, to be given by them to *Pearson*, or left at his last or most usual place of abode. The deed contained a power to enter and to sell in default of payment.

In

A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not.

In 1856, the rent being in arrear to the extent of 116*l.*, the brewers distrained and seized the goods, &c. comprised in the mortgage; but instead of selling they took them at a valuation in discharge of the rent, and they then sued the Plaintiff on his promissory note for 125*l.* and interest.

1857.  
PEARL  
v.  
DEACON.

The Plaintiff thereupon instituted this suit against the brewers, alleging that he had no notice of the mortgage until lately, and insisting that the Defendants had thereby extended the time for payment of the 250*l.*, and thus varied the terms on which the loan had been made, and that they had thereby released the Plaintiff, as surety, on the promissory note. Secondly. That the Plaintiff was only liable for half the 250*l.*, after deducting the value of the furniture taken by the Defendants.

The bill prayed a declaration, that the Plaintiff had been released from all liability. Secondly, for an account of what had been received by the Defendants for the furniture and pension, and an account of what was due in respect of the 250*l.*, and that the Plaintiff might be declared liable only for half the balance, if any. Thirdly, for an assignment to the Plaintiff of the mortgage and other securities. Fourthly, for an injunction to restrain the proceedings at law.

The Defendants proved (as the Court held) that the Plaintiff had notice of the mortgage at the time it was taken.

Mr. *R. Palmer* and Mr. *Bevir*, for the Plaintiff. The promissory note for the 125*l.* was payable on demand, but by the subsequent mortgage, the same sum was made payable on the 16th of *November*, 1858, or at such earlier time as the brewers should appoint in writing,



1857.

PEARL  
v.  
DEACON.

writing, &c. This was a variation in the terms; a difficulty might have arisen in giving the necessary notice, and the surety was therefore discharged.

Secondly. A surety is entitled to all the securities for the debt; the Plaintiff, therefore, has a right to the benefit of the mortgage, and the Defendants having realized it and taken the equity of redemption, the amount received discharged, *pro tanto*, the debt and likewise the Plaintiff as surety. They cited *Bowker v. Bull* (a); *Capel v. Butler* (b); *Nisbet v. Smith* (c); *Boulton v. Stubbs* (d); *Eyre v. Bartrop* (e); *Reade v. Lowndes* (f); *Calvert v. London Dock Company* (g); *Bonar v. Macdonald* (h); *Whitcher v. Hall* (i); *Mayhew v. Crickett* (k).

Mr. Selwyn and Mr. W. R. Ellis, for the Defendants. If the Plaintiff had notice of the mortgage and of the terms of it, he cannot complain; if he had not, then it was an additional security taken by the Defendants, and not within the Plaintiff's contract. But, at all events, the liability of the chattels on the premises to the rent was paramount the mortgage and to any right of the Plaintiff. The produce was therefore properly applicable to the payment of a separate and distinct demand having priority.

They cited *Twopenny v. Young* (l); *Holmes v. Bell* (m); *Bell v. Banks* (n); *Ansell v. Baker* (o); *Wade v. Coope* (p); *Newton v. Chorlton* (q); *Dawson v. Lawes* (r); *Bonser* v.

(a) 1 *Simons* (N. S.) 29.(b) 2 *Sim. & S.* 457.(c) 2 *Bro. C. C.* 579.(d) 18 *Ves.* 20.(e) 3 *Mad.* 221.(f) 23 *Beav.* 361.(g) 2 *Keen*, 638.(h) 3 *H. Lds. Cas.* 646.(i) 5 *Barn. & C.* 269.(k) 2 *Swan.* 185; 1 *J. Wilson*, 418.(l) 3 *B. & Cr.* 208.(m) 3 *Man. & G.* 213.(n) *Ibid.* 258.(o) 15 *Q. B. Rep.* 20.(p) 2 *Simons*, 155.(q) 10 *Hare*, 646.(r) 1 *Kay*, 280.

*v. Cox* (a); *Craythorne v. Swinburne* (b); *Ex parte Whitworth* (c); *Plomer v. Long* (d); *Ex parte Rushforth* (e); *Kirby v. The Duke of Marlborough* (f); *Ex parte Harvey* (g); *Farebrother v. Wodehouse* (h).

1857.

PEARL  
v.  
DRACON.

Mr. R. Palmer, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

June 9.

I retain the opinion expressed by me yesterday. The facts are shortly these:—Mr. *Pearson* applied to the Defendants, who are brewers at *Windsor*, for a loan of 250*l.*, to enable him to take a public-house, called *The Carpenters' Arms*. They said we will do so if you will get a good surety for the amount, and assign over your pension and furniture. That was agreed to; *Pearson* offered the Plaintiff as his surety for half the amount, and *Castles* as surety for the other half; the Defendants accepted them, and on the 16th of *November*, 1852, two joint and several promissory notes were given to the Defendants, one by *Pearson* and the Plaintiff, and the other by *Pearson* and *Castles*. Six days afterwards, viz., on the 23rd of *November*, *Pearson* assigned his pension and all the goods and chattels to secure this debt of 250*l.* On this transaction, the first point which was raised by the Plaintiff, in my opinion, fails. He says that this arrangement was a variation of the contract of suretyship, and that it discharged the Plaintiff, because the money was made payable on the 16th of *November*, 1858, or six years after the date of the mortgage. If the case had rested here, the Plaintiff would probably have been successful, but the deed

goes

(a) 4 *Beav.* 379.

(b) 14 *Vesey*, 160.

(c) 2 *Mont.*, D. & De G. 164.

(d) 1 *Stark.* 153.

(e) 10 *Vesey*, 409—414.

(f) 2 *M. & S.* 18.

(g) 4 *De G., M. & G.* 881.

(h) 23 *Beav.* 18.

1857.  
  
 PEARL  
 v.  
 DEACON.

goes on, "or at such earlier or other time" as the Defendants should appoint for the payment thereof "in and by a notice in writing." I do not think that this was such a variation in the terms of the security as to discharge the surety; but the question is of little importance, as I am of opinion, on the evidence, that the Plaintiff had notice of this assignment and of the terms of it.

The only other facts important to be stated are these:—The Defendants were landlords of *The Carpenters' Arms*, and in the year 1856, four years after this transaction, *Pearson's* rent being considerably in arrear, the Defendants distrained and put a broker in possession of the furniture under the distress; on this, by arrangement, instead of selling the goods, they took them at a valuation for 116*l*.

The question is this:—The furniture having been expressly mortgaged for the 250*l*., was it within the power of the Defendants, to the injury of the surety, to give up the security on the furniture for the 250*l*. and take it in discharge of another and different debt due to themselves? I am of opinion that they could not do so. It was said, that this security was not within the scope of the Plaintiff's contract, and that a surety cannot go beyond it. That is a mistake with respect to the relation between a principal and surety. Lord *Eldon* expressly stated, in *Craythorne v. Swinburne* (a), that the rights of a surety depend rather on a principle of equity than upon contract; there may be a *quasi* contract, but it arises out of the equitable relation between the parties, to be inferred from the knowledge of an established principle of equity. The same doctrine is also stated in *Mayhew v. Crickett* (b), and it is laid down distinctly

(a) 14 *Vesey*, 164, 169.

(b) 2 *Swann*. 191.

distinctly, that sureties are entitled to the benefit of every security which the creditor has against the principal debtor, and that whether the surety knows of the existence of those securities or not is immaterial. If the creditor makes available any of his securities, the surety is entitled to the benefit of it.

1857.

PEARL  
v.  
DEACON.

The case of *Capel v. Bulter* (a) is a distinct authority for this proposition. Mr. *Ellis* sought to distinguish that case by saying, that, in that case, there was a recital of all the securities, but that here there was none. The answer, however, is this:—That there was notice to the surety of the whole transaction, and being so, the reciting it is immaterial. Lord *Eldon* distinctly laid down in *Mayhew v. Crickett* (b), that it is a matter of perfect indifference, whether the surety is aware of another security having been taken by the creditor or not.

In the judgment of Vice-Chancellor *Wood* in *Newton v. Charlton* (c), there is a statement, in every word of which I concur. He says, as regards the creditor, "He is bound to give to the surety the benefit of every security which he holds at the time of the contract,—every security which he then holds; and he is not allowed, in any way, to vary the position of the surety with reference to those securities; that has been decided most distinctly in *Mayhew v. Crickett* by Lord *Eldon*, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he afterwards discharged the principal debtor. Lord *Eldon* held it utterly immaterial, whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it, and if the benefit were lost to him, he was at once discharged (d)." It

(a) 2 Sm. & S 457. (b) 2 Swan. 185. (c) 10 Hare, 651.  
(d) Affirmed by the Lords Justices, 16th of July, 1857.

1857.

PEARL  
v.  
DRAGON.

It is argued that this was a security for a separate and distinct debt; but I am of opinion that it was not taken for a separate and distinct debt, but for the debt of 250*l*.

I am of opinion, therefore, that if the Defendants enforce payment of the rent due to them out of the furniture, and then seek to compel the Plaintiff to pay the debt for which he became surety, the Plaintiff is entitled to say to them, "you must give me the benefit of the security on the furniture and pension which were mortgaged to you for this debt."

What the Defendants have done is this:—They have thought fit to apply the produce of the furniture to a different and distinct debt, contrary to the original arrangement, on the terms of which, it is to be assumed, the surety consented to become liable. I am therefore of opinion, that whatever the Defendants have received ought to be applied rateably in discharge of the whole debt, and that the Plaintiff is only liable to pay half of the balance.

If it were otherwise, the result would be this:—That if a man advanced 1,000*l*. to another on a mortgage of an estate, and had the security of ten sureties, each of whom was liable for 100*l*., he might release or reassign the mortgage, and then sue the ten sureties. This is a proposition impossible to be sustained.

If the Defendants have received anything from *Cas- tles*, it must not be taken into account; but with respect to the money received from *Pearson*, it ought to be taken as a discharge for the debt.

As to the pension, either they have received it or they have not; if they have, it was distinctly applicable to the payment of their debt; if they have not, they must shew why they did not make that security available.

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1857.

## RANDALL v. DANIEL.

June 2, 4.

**BY** an indenture, dated the 7th day of *May*, 1773, made between "the settlor" of the one part, and seven trustees of the other part, in consideration of natural love and affection, the settlor conveyed to the trustees and their heirs, a mansion-house at *Clifton*, and also certain hereditaments situate in the city of *Bristol* and elsewhere, in the county of *Gloucester*, to the use of such persons as the settlor should appoint, and in default thereof to the use of the settlor for life, with remainder to the use of his sister *Ann Goldney* for life, with remainder to the use of the trustees and their heirs, upon trust to permit the mansion-house, &c. to be occupied and used by *Gabriel Goldney of Chippenham* for his life, and after his death to permit the same to be occupied by *Gabriel Goldney* (the eldest son of *Gabriel Goldney of Chippenham*) for his life, and after his decease by *Thomas Goldney* (the second son of *Gabriel Goldney of Chippenham*) for his life, and afterwards to permit it to be used by *Samuel Goldney of Bath*

The settlor conveyed real estate to trustees in fee, to the use of *A.*, *B.*, *C.* and four others successively, for life, and afterwards upon trust to convey to all and every the sons and daughters of the eight tenants for life, "who should be then living, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail," the sons and daughters of *A.*, and their heirs, to take

before all the other persons named, and the sons and daughters of *B.* and their heirs to take next after the sons and daughters of *A.* and their heirs (and similar as to the five others in succession). And the sons of *all and every the persons* last above named and the heirs, &c. to take before the daughters and their heirs. Held, that the daughters of *A.* took in priority of the sons of *B.*


A testator devised to trustees, to the use of eight persons successively for life, and afterwards in trust to convey to all the sons and daughters of the eight who should be then living, and the heirs of their bodies "respectively, in a due course of entail;" and he empowered his sister to cut down the estates of children "thereafter born" of the eight to life estates. The Plaintiff was a child of one of the eight born at the date of the will. Held, that though the trust was executory, she was tenant in tail, and not tenant for life.

A testator made a voluntary settlement of some real estates. He afterwards by his will devised other real estates to nearly the same uses. Held, that the deed could not be referred to for the purpose of construing the will.

## DATES.

1773. Settlement.  
Feb. 1776. Plaintiff born.

June 1776. Will.  
1786. Death of testator.  
1856. Last tenant for life died.

1857:  
  
 RANDALL  
 v.  
 DANIEL.

*Bath* (brother of *Gabriel Goldney* of *Chippenham*) for his life, and after his decease to permit it to be used by *Francis Bennett Goldney* (the eldest son of *Samuel Goldney*) for his life, and after his decease by *Thomas Goldney* (the second son of *Samuel Goldney*), for his life, and after his decease by *Samuel Goldney* (the third son of *Samuel Goldney*) for his life, and afterwards to permit it to be used by *Thomas Goldney* of *Chippenham* (brother of *Gabriel Goldney* and *Samuel Goldney*) during his life; and after the determination of the estates thereinbefore limited, then upon trust to "convey and assure the said capital messuage and other the freehold premises thereinbefore mentioned to all and every other the sons and daughters of *Gabriel Goldney* of *Chippenham*, and to all and every other the sons and daughters of his brother *Samuel Goldney* of *Bath*, and to all and every the sons and daughters of their brother *Thomas Goldney* of *Chippenham*, and to all and every the sons and daughters of the said *Gabriel Goldney* (eldest son of the said *Gabriel Goldney* of *Chippenham*), and to all and every the sons and daughters of the said *Thomas Goldney* (second son of the said *Gabriel Goldney* of *Chippenham*) and to all and every the sons and daughters of the said *Francis Bennett Goldney*, and to all and every the sons and daughters of the said *Thomas Goldney*, second son of the said *Samuel Goldney* of *Bath*, and to all and every the sons and daughters of the said *Samuel Goldney*, third son of the said *Samuel Goldney* of *Bath*, who should be then living, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail, the sons and daughters of the said *Gabriel Goldney* of *Chippenham*, and the heirs of his, her and their body and bodies respectively, to take and be preferred before all the other persons last above named; and the sons and daughters of, the said  
*Samuel*

*Samuel Goldney of Bath*, and the heirs of his, her and their body and bodies respectively, to take and be preferred next after the sons and daughters of the said *Gabriel Goldney of Chippenham* and the heirs of their bodies, and before all the other persons last above named; and the sons and daughters of the said *Thomas Goldney of Chippenham*, and the heirs of his, her and their body and bodies respectively, to take and be preferred next after the sons and daughters of the said *Samuel Goldney of Bath* and the heirs of their bodies, and before all the other persons last above named; and the sons and daughters of the said *Gabriel Goldney*, eldest son of the said *Gabriel Goldney of Chippenham*, and the heirs of his, her and their body and bodies respectively, to take and be preferred next after the sons and daughters of the said *Thomas Goldney of Chippenham* and the heirs of their bodies, and before all the other persons last above named; and the sons and daughters of the said *Thomas Goldney* (second son of the said *Gabriel Goldney of Chippenham*), and the heirs of his, her and their bodies respectively, to take and be preferred next after the sons and daughters of his brother the said *Gabriel Goldney* and the heirs of their bodies, and before all the other persons last above named; and the sons and daughters of the said *Francis Bennett Goldney*, and the heirs of his, her and their body and bodies respectively, to take and be preferred next after the sons and daughters of his cousin the said *Thomas Goldney* and the heirs of their bodies, and before all the other persons last above named; and the sons and daughters of the said *Thomas Goldney* (second son of the said *Samuel Goldney of Bath*), and the heirs of his, her and their body and bodies respectively, to take and be preferred next after the sons and daughters of the said *Francis Bennett Goldney* and the heirs of their bodies, and before the sons and daughters of the

1857.

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RANDALL  
v.  
DANIEL.



1857.  
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 RANDALL  
 v.  
 DANIEL.

said *Samuel Goldney*, third son of the said *Samuel Goldney of Bath*, and the heirs of their bodies. *And the sons of all and every the persons last above named, and the heirs of his and their body and bodies, to take before the daughters* and the heirs of her and their body and bodies, and the eldest of such sons and the heirs of his body to take before the younger of such sons and the heirs of his body, and the eldest of such daughters and the heirs of her body to take before the youngest of such daughters and the heirs of her body." And for want of such issue, then upon trust to convey the mansion unto the right heir of the settlor.

And upon trust to receive the rents of the other hereditaments, and after certain payments, to pay over the residue of such rents to the person who should by virtue of the limitations therein contained be entitled to the use of his mansion-house during such time as he or she should be entitled to such use; and upon trust when any person should be entitled to a settlement of the mansion-house for an estate tail or of inheritance, to convey the same to such person.

The settlement contained a proviso, that in case *Gabriel Goldney of Chippenham*, *Samuel Goldney of Bath* and *Thomas Goldney of Chippenham*, or either of them, should have any other child or children hereafter born in the lifetime of the settlor, or of *Anne Goldney*, then that it should and might be lawful for *Anne Goldney*, by deed or will, "to revoke the uses hereby limited and declared as to and in respect of such children or child which shall be so born in her lifetime, and to limit and restrain the use as to such children or child to the life only of such children or child, in the same manner as the use is limited and restrained to the children now in being of the said *Gabriel Goldney of Chippenham* and *Samuel Goldney of Bath*."

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The settlor, by his will dated the 7th of *June*, 1776, gave and devised unto four trustees, and their heirs, several other hereditaments, to the use of the testator's sister *Anne Goldney* for life, and after her decease, to the use of the trustees and their heirs, upon trust to permit *Gabriel Goldney* of *Chippenham*, *Gabriel Goldney* (his eldest son) and *Thomas Goldney* (his second son), to receive the rents for their lives successively; and after the determination of the estates so limited, upon trust to permit the testator's cousin *Samuel Goldney* of *Bath*, and *Francis Bennett Goldney* (his eldest son), *Thomas Goldney* (his second son) and *Samuel Goldney* (his third son), to receive the said rents for their lives successively; and after the determination of such estates and interests, upon trust to permit the testator's cousin *Thomas Goldney* of *Chippenham* to receive the rents for his life [these trusts for the benefit of these several persons successively for their lives were identical with the trusts for the same persons for their lives successively contained in the settlement]; and after the determination of the said estates and interests, upon trust that the said trustees and the trustees or trustee for the time being should, "by and with the advice of Counsel learned in the law, convey and assure all and singular the same premises, subject as aforesaid, to all and every other the sons and daughters of *Gabriel Goldney* of *Chippenham*, and to all and every the sons and daughters of his brother *Samuel Goldney* of *Bath*, and to all and every the sons and daughters of their brother *Thomas Goldney* of *Chippenham*, and to all and every the sons and daughters of *Gabriel Goldney* (eldest son of the said *Gabriel Goldney* of *Chippenham*), and to all and every the sons and daughters of *Thomas Goldney* (second son of *Gabriel Goldney* of *Chippenham*), and to all and every the sons and daughters of *Francis Bennett Goldney*, and to all and every the

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1857.

RANDALL  
v.  
DANIEL.

1857.

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 RANDALL  
 v.  
 DANIEL.

sons and daughters of *Thomas Goldney* (second son of *Samuel Goldney of Bath*), and to all and every the sons and daughters of the said *Samuel Goldney* (third son of *Samuel Goldney of Bath*) who should be then living, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail." The will contained provisions regulating the lines of succession and the rights of priority as between the sons and daughters of the said several persons, strictly and literally identical with those declared in the settlement, and for want of such issue, upon trust to convey unto the right heir of the testator, and the heirs of his body.

The will contained this proviso:—"that in case *Gabriel Goldney of Chippenham*, *Samuel Goldney of Bath* and *Thomas Goldney of Chippenham*, or either of them, shall have any other child or children hereafter born in the lifetime of my sister *Ann Goldney*, then it shall and may be lawful for her, by deed or will, to revoke the uses hereby limited and declared as to and in respect of such children or child which shall be so born in her lifetime, and to limit and restrain the use, as to such children or child, to the life only of such children or child, in the same manner as the use is limited and restrained to the children now in being of *Gabriel Golding of Chippenham* and *Samuel Goldney of Bath*, anything in this my will contained or implied to the contrary thereof in anywise notwithstanding."

The testator died in 1786, and his sister in 1796, and neither of them executed their powers.

*Gabriel of Chippenham*, besides the two named in the settlement and will, had two other children born in the testator's lifetime, viz. *Harry*, who was born in 1774 and died in 1852, and the Plaintiff *Sarah*, who  
 was

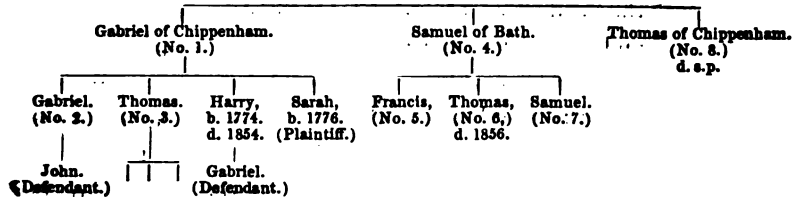
was born in *February*, 1776, and therefore after the date of the settlement, but prior to the date of the will (*June*, 1776).

1857.  
RANDALL  
v.  
DANIEL.

*Thomas*, the last survivor of the eight tenants for life, died in 1856, at which time all the "sons or daughters" of *Gabriel* of *Chippenham*, *Samuel* of *Bath* and *Thomas* of *Chippenham*, had died, except the Plaintiff, the only child then living of *Gabriel* of *Chippenham*.

The Defendant *John* was the son of *Gabriel* (No. 2), and the Defendant *Gabriel* was the son of *Harry*.

The following diagram will shew more clearly the state of the family:—



The Plaintiff instituted this suit against the trustees, the legal personal representative of the testator, *John* the son of No. 2, and *Gabriel* the son of *Harry*, stating that she was "the only child of *Gabriel Goldney* of *Chippenham* (the first tenant for life), who was living at the determination of the several estates and interests limited in and by the indenture of settlement and will respectively, prior to the trust or direction to settle, convey and assure the trust estates and premises to all and every other the sons and daughters of the said *Gabriel Goldney* of *Chippenham*, and other the tenants for life therein named, who should be then living, in a course of entail, with priority to the sons and daughters of the said *Gabriel Goldney* of *Chippenham*; and that the Plaintiff, upon the death of *Thomas Goldney*,  
the



1857.

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RANDALL  
v.  
DANIEL.

the sixth and last surviving tenant for life, became entitled as equitable tenant in tail in possession to the hereditaments and premises comprised in and subject to the trusts of the indenture of settlement and will respectively."

The bill also stated, that the Defendant *John Goldney* alleged, that the trusts and limitations of the settlement and will, subsequent to the life estates, were void for remoteness or uncertainty, and he claimed as the heir at law of the settlor. That in the event of the said trusts and limitations being held valid, *John Goldney* alleged, that the power contained in the will to restrain the interests of children born in the lifetime of the said *Ann Goldney* was directory and imperative, and he insisted that the estates and interests thereunder of *Harry Goldney* deceased, and of the Plaintiff, ought to have been and were, in equity, to be deemed to have been restrained to life estates or interests only, and he claimed to be entitled to the first estate tail, subject to the trusts of the settlement and will respectively, under the direction to settle, in a due course of entail, upon the sons and daughters of *Gabriel Goldney* of *Chippenham*, by virtue of the preference which he alleged to be thereby given to sons; and if not so entitled under the settlement, he claimed to be, at all events, so entitled under the trusts of the said will.

The Plaintiff stated that she had barred the entail; and she prayed a declaration, that upon the death of the last survivor of the tenants for life named in the settlement and will respectively, she became entitled to the first estate or interest in tail, under the trusts and limitations of the settlement and will, and that the real and personal estate might be conveyed and assured to her absolutely.

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Mr. *R. Palmer* and Mr. *Stiffe*, for the Plaintiff, argued, that under the settlement the Plaintiff was tenant in tail, and was now entitled to a conveyance of the estates. They cited *Eden v. Wilson* (a); *Draycott v. Wood* (b).

1857.

RANDALL  
v.  
DANIEL.

Mr. *Selwyn*, for the trustees.

Mr. *C. Hall* and Mr. *Howe*, for *John Goldney*. First, the intention of the testator was, that the males should always be preferred to females, and therefore the Plaintiff cannot take while there are male issue of the survivors of the several tenants for life. Secondly, as regards the property comprised in the will, the Plaintiff being born at its date, and there being a clear direction to the trustees to settle, or an executory trust, the Plaintiff's estate must be cut down to a life estate; *Rockfort v. Fitzmaurice* (c); *Lyddon v. Ellison* (d).

The testator has shewn an anxious desire to settle the property as strictly as possible. He intended his sister to have the power of restricting estates tail and of cutting them down to life estates, therefore, as to the devised estate, the Plaintiff takes nothing, or a life estate only. They cited *Scarisbrick v. Lord Skelmersdale* (e); *Trevor v. Trevor* (f); *Sayer v. Bradly* (g).

Mr. *Giffard*, for *Gabriel Goldney*.

Mr. *R. Palmer*, in reply, referred to *Oddie v. Woodford* (h); *Thellusson v. Robarts* (i).

*The*

(a) 4 H. L. Cas. 257.  
(b) 28 Law T. 196.  
(c) 2 Drury & W. 1.  
(d) 19 Beav. 565.  
(e) 4 Y. & Coll. 78.

(f) 1 H. L. Cas. 239.  
(g) 5 H. L. Cas. 873.  
(h) 3 Myl. & Cr. 584.  
(i) 23 Beav. 321.

1857.

*The MASTER of the ROLLS* reserved judgment.

RANDALL

v.

DANIEL.

*The MASTER of the ROLLS.*

June 4.

There are two questions of construction in this case, but the second only arises in case the first is decided in one way.

The first question is this:—The settlor, in a concluding clause in the settlement, has directed that sons shall take before daughters; and the question is, whether that clause applies generally, so that the sons of any one of the *stirpes* before mentioned are to take before a daughter, belonging to any of the *stirpes*, or whether it is to be applied, distributively, to each *stirps* in particular. Having considered this clause carefully, both at the time of the argument and since, I think that the proper construction is, that it is to be read distributively, and that it is applicable to each of the classes.

The apparent scheme of the settlement is this: he gives eight tenancies for life amongst three brothers and their sons; he gives the eldest brother the first tenancy for life; he gives the two sons of that brother successive tenancies for life; he gives the second brother the next estate for life, and to his three sons the following estates for life; and then he gives to the third brother the last estate for life. Having done that, he proceeds to give estates tail to the sons and daughters of the tenants for life, and then he inserts the order of these tenants in tail. Instead of first taking the eldest *stirps* and exhausting the members of that class, and so on, he takes the elder generation and exhausts the elder generation, and then he

he comes to the second generation; and having so done, he specifies, in the first place, who are the persons of that generation to take, and then he describes the estates they are to take, and then he describes the order and rank in which they are to take. I suppose it was thought shorter and more convenient to adopt that course. Accordingly, having given the eight estates for life in succession, in the manner I have stated, he proceeds to say, that he gives estates tail to all the sons and daughters of the eight in a different order. Then he uses these words at the end, having specified them all, "who should be then living," that is, at the death of the surviving tenant for life, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail." Up to that point it is clear, that all took collectively, and probably without the word "respectively," they would take as joint tenants, and with the word "respectively," probably as tenants in common in tail. Then he proceeds to state this, "the sons and daughters of the said *Gabriel Goldney of Chippenham*, and the heirs of his, her and their body and bodies respectively, to take and be preferred before all the other persons last above named." Then "the sons and daughters of *Samuel Goldney of Bath*, and the heirs of his, her and their body and bodies respectively, to take and be preferred next and after the sons and daughters of *Gabriel Goldney of Chippenham*;" and then he goes through the several other classes, specifying who is to take after each.

I think it is important to bear this in mind, because it was justly observed that I should be violating the words of this clause, if I were to direct that, for instance, the sons of *Samuel Goldney of Bath* should take before the daughters of *Gabriel Goldney of Chippenham*, for he expressly states, that "the sons and daughters

1857.

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RANDALL  
v.  
DANIEL.



1867.

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 RANDALL  
 v.  
 DANIEL.

daughters of *Gabriel Goldney of Chippenham*" are to take before everybody else, and that the sons and daughters of *Samuel Goldey of Bath* are to take next after the sons and daughters of *Gabriel Goldney of Chippenham*. There is an express and distinct direction of the manner in which they are to take. If, therefore, I can find any construction with respect to the subsequent clauses, which is consistent with that view of the case, I think, upon the ordinary rules of construction, I am bound to follow it, and thus give effect to every word I find in the will.

After saying they are to take in the order I have specified, the clause in question proceeds thus, "and the sons of all and every the persons last above named, and the heirs of his and their body and bodies, to take before the daughters and the heirs of her and their body and bodies, and the eldest of such sons and the heirs of his body to take before the younger of such sons and the heirs of his body, and the eldest of such daughter and the heirs of her body to take before the youngest of such daughters and the heirs of her body." Not only do I think this direction, if taken by itself, is to be applied distributively, as amongst the sons and daughters of each *stirps*, but I also think that construction is made more obvious by the latter part of the clause. In the first place, as I have before stated, it would contradict what he has before said, if it mean that any son is to take before any daughter, that is to say, any son of a younger *stirps* is to take before any daughter of an elder *stirps*. Besides which there is evidently no distinction between the direction that "the sons of all and every person last named" are to take before the daughters, and the direction that "the eldest of such sons and the heirs of his body are to take before the younger of such sons and the heirs of his body,"

body," and also that the elder of such daughters is to take before the youngest of such daughters. But these directions clearly apply to each *stirps* separately and respectively. Nobody will contend that under these words a son of the younger *stirps*, who happened to be born before, would take before the son of an elder *stirps*, who was born since. If, then, the latter part of that clause evidently applies distributively, why should not the former part apply distributively? I think the whole of it applies distributively, and that the scope of the latter part of the will was, first, to describe as a class the persons to take; next, the estates which they are to take; thirdly, the order in which they are to take; and lastly, the distribution as between themselves and each *stirps*. I think that is the true construction of the settlement, and accordingly, if necessary, I will make a declaration to that effect.

1857.

RANDALL  
v.  
DANIEL.

Having so decided, the second question which was argued by Mr. *Hall* arises, and at first I thought there was more difficulty in it than upon reflection I have found. It was argued, that the children of *Gabriel Goldney of Chippenham*, who were in being at the date of the will of the testator, took life estates. If so, it includes the Plaintiff, because she was in being at the time the will was executed. The argument of Mr. *Hall*, as I understood it, was, that this was an executory trust to settle an estate, and that therefore it is not merely to be construed literally, but that the general intent must be regarded, and that the particular intent must be sacrificed to the general intent; that the general intent to be discovered from the whole of this will is to make the strictest settlement possible, and that, in addition to this, it contains words tending to this end, so that no violation of the particular intent is necessary to lead to this result. Being inclined to adopt every one

1857.

RANDALL  
v.  
DANIEL.

one of these propositions, I was disposed also, at first, to adopt the conclusion; but, upon reading the will, I think there is no ambiguity upon it, that it does not admit of the argument or of the conclusion, and that the testator has expressed distinctly what he means. I fully concur in the argument, that it is not possible to look at the settlement for the purpose of construing this will, and that you must look at the will alone. Having given life estates analogous to those contained in the settlement itself, he directs the trustees, "by and with the advice of Counsel, learned in the law, to convey and assure all and singular the premises to all and every other the sons and daughters of *Gabriel Goldney*," &c., "who should be then living, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail." I think that having previously specified all the persons who were to take life estates, he meant to give estates tail to all the remaining persons, and that this is the express meaning of the words he has used. The power which the testator gave to his sister *Ann Goldney*, which, however, as was justly observed, she could not have exercised, was pressed upon me during the argument, to shew his desire of limiting the estates in the strictest settlement he could. This power authorized *Ann Goldney* to revoke the uses thereby limited and declared as to and in respect of such children as should be so born in her lifetime, and cut down his then estates to estates for life. But this power nowise controls the sense of the words used in the will, and they are, in my opinion, unambiguous, and under them, I think, that the Plaintiff is tenant in tail.

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1857.

MAY v. BIGGENDEN.  
CHEESEMAN v. MAY.

Jan. 29, 30.

Feb. 12.

THESE cases were argued by Mr. *R. Palmer* and Mr. *W. D. Lewis* for the Plaintiff *May*.

Mr. *Lloyd* and Mr. *Bazalgette* for *Biggenden*.

Mr. *R. Palmer* in reply.

The MASTER of the ROLLS reserved judgment.

*The MASTER of the ROLLS.*

The first suit was instituted in *May*, 1849, by the Plaintiff, against the Defendant Mr. *Biggenden* and Mr. *Cheeseman* deceased, for an account of various transactions between the Plaintiff and Mr. *Biggenden*, and to relieve Mr. *May* from the consequences which would follow him, if an action instituted against him, by Mr. *Biggenden*, were permitted to continue.

In the month of *October*, 1851, the suit of *Cheeseman v. May* was instituted, to take the accounts between the Plaintiff and Defendant. In *June*, 1853, I made a decree in both causes for taking the accounts between all the three parties. Under that decree, considerable difficulty

Less than one-six was taken off a bill of costs on taxation, but more than one-sixth was taken off in the suit (which was one for a general account between the solicitor and client), on other grounds, into which the Taxing Master could not enter. The costs of taxation were allowed to the solicitor.

A solicitor took up his client's bills. Held, that these payments could only be treated in the same light as any other ordinary cash advances made by the solicitor for the benefit of his client, and that the solicitor was not entitled to charge interest thereon.

In a bill for an account, the costs were given to the Plaintiff, although a balance of 2,000*l.* was found due from him to the Defendant, the Plaintiff having succeeded in the substantial matters of litigation.

Principles on which the costs of a suit for an account are regulated.

1857.  
MAY  
v.  
BIGGENDEN.  
CHEESEMAM  
v.  
MAY.

difficulty arose in taking the accounts; and four of the items in contest were adjourned into Court, on which evidence, *vivâ voce*, was taken on the 12th and following days of *June*, 1854.

The first question related to the validity of the deed of 24th of *December*, 1844, on which depended the question whether fifty pockets or bags of hops, which had been taken at the value of 1,000*L.*, in part payment of the sum given to *Oliver's* representatives, as the purchase-money for the judgment obtained by them against *Cheeseman*, were the property of *Cheeseman* at that time, or whether they were vested in the trustees of the deed of *December*, 1844.

The second question was, the validity of a guarantee of the 3rd of *April*, 1847, given by Mr. *May* to Mr. *Biggenden*, undertaking to pay certain costs due by Mr. *Cheeseman* to Mr. *Biggenden*.

The third question was, the interest on a bill for 500*L.*

The fourth question was, the validity of an I. O. U. for 250*L.*, given by Mr. *May*, that is, whether value had been given for it.

After hearing the evidence on all these points, I decided them all in favour of the Plaintiff, Mr. *May*. I held the deed of *December*, 1844, to be operative, and that the hops passed under it to the trustees of that deed; I held that the guarantee of *April*, 1847, was absolutely void. I disallowed the interest claimed on the second bill for 500*L.*, and also the sums claimed to have been paid by Mr. *Biggenden* on the I. O. U. for 250*L.*

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The case now comes before me for further consideration on the Chief Clerk's certificate. Some minor points arise upon it, which have been reserved by the Chief Clerk for my consideration, and which I disposed of at the hearing. One of these was the costs of the taxation of Mr. *Biggenden's* bill, to which Mr. *Biggenden* is, in my opinion, entitled. His bill, as sent in, was 1,546*l.* 16*s.* 4*d.*, from which only 42*l.* 8*s.* 10*d.* was taxed off. It is true that the amount due on the bill is reduced by the Chief Clerk to 883*l.* 8*s.* 8*d.*, by deducting 653*l.* 19*s.* 4*d.* (a); but this is in respect of a totally different matter, viz., the costs of Mr. *Cheeseman*, the right to which depended on the validity of the guarantee of April, 1847,—a question the Taxing Master could not enter into (b). The taxation has shewn the propriety of the amount of Mr. *Biggenden's* charges, which was the only matter submitted to the Taxing Master; and the costs of the taxation must be borne by the Plaintiff, Mr. *May*, or his estate (c).

1857.  
MAY  
v.  
BIGGENDEN.  
CHEESEMAM  
v.  
MAY.

The next item was a claim for interest, made by Mr. *Biggenden* against Mr. *May*, in respect of sums paid by him on account of Mr. *May* in taking up bills on which Mr. *May* was liable. I am of opinion that I can only treat these payments in the same light as any other ordinary cash advances made by Mr. *Biggenden* for the benefit of Mr. *May*. There was no agreement between them that these advances should bear interest. Mr. *Biggenden* might have delivered his bill, and enforced payment of what was really due upon it, as soon

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(a) And by adding 33*l.* 0*s.* 6*d.*, the costs of taxation.

(b) The taxation took place under an order of the 7th July, 1849.

(c) See *White v. Milner*, 2 Hen. Bl. 357; *Rigby v. Ed-*

*wards*, Beames on Costs, App. 24; *The Attorney-General v. Nethercoat*, 3 Beav. 297; *Muskett v. Hill*, *ibid.* 301; *In re Clark*, 13 Beav. 173, and 1 De Ges. M. & G. 43.

1857.  
  
 MAY  
 v.  
 BIGGENDEN.  
 CHEESEMAN  
 v.  
 MAY.

as he pleased; and I am unable to discover any principle on which these payments, though applied to take up bills, which bore interest as against Mr. *May*, are to be treated differently from the other ordinary cash advances made by Mr. *Biggenden*. It is true that his bill was delivered in *May*, 1849, and that it has not yet been paid; but this is solely owing to his having claimed a larger amount than has ultimately been found due to him, and the money to answer his bill has, in this cause, been paid into Court, and invested.

These are but trifling matters; the real question between these parties is the costs of this suit, necessarily very heavy; and on this point I have, after hearing the arguments of Counsel, thought it necessary to read through the pleadings in both causes, and to refer to my notes of the former discussion before me, and also to look over the evidence, and particularly the correspondence, for the purpose of ascertaining what it was that occasioned this suit, and who has been in the right, and to what extent, with relation to each of the questions raised and decided in it.

On the 28th of *May*, 1849, Mr. *Biggenden* delivered to Mr. *May* three cash accounts and his bill of costs; the third of such cash accounts was the general account, including the two former, and the bill of costs on it. He claimed a sum of 3,214*l.* to be due to him; the total amount found due to Mr. *Biggenden* is 1,972*l.* 6*s.* 11*d.*, the sum of 1,241*l.* 13*s.* 1*d.* having been disallowed. £653: 19*s.* 4*d.* of this was deducted in respect of my disallowance of the claim under the guarantee of 3rd of *April*, 1847. On this point, Mr. *May* succeeds completely. The whole of the costs, therefore, occasioned by that claim, ought to be borne by Mr. *Biggenden*.

£200

£200 has been disallowed in respect of the I. O. U. for 250*l.* and £91 : 13*s.* 4*d.* has been disallowed in respect of the interest on the bill of exchange for 500*l.*, which I have referred to as two of the questions in the cause ; on these items, therefore, Mr. *Biggenden* wholly fails. So also Mr. *Biggenden* fails with respect to the bill of exchange for 430*l.* which was given to a person of the name of *Sedgwick*, who was but the nominee of Mr. *Biggenden*, which is claimed by the account sent in *May*, 1849, and which forms the subject of the declaration in the action brought, on which judgment might have been obtained, but which bill is not mentioned in the particulars of demand delivered in that action. The costs occasioned by all these claims ought, in my opinion, to be borne by the Defendant, who has unsuccessfully brought them forward. With respect to these also, I entertain the less doubt, because, after an explanation had been requested by Mr. *May*, Mr. *Biggenden* brought the action against Mr. *May* for the whole amount claimed, and insisted on payment, giving no explanation relative to the items ; so that, unless by filing a bill for an account, it would have been difficult, if not impossible, for Mr. *May* to have resisted any part of the demand made.

There is also another matter, which, besides the validity of the guarantee of *April*, 1847, formed a principal cause of contention in the suit, and which requires a little further investigation. This is the claim made relative to the interests taken by the Plaintiff and Defendant in the judgment obtained by *Oliver's* representatives, and sold by them. This, as I have already stated, was one of the questions which were brought before me in Court on the adjourned summons in *June*, 1854. It is contended, on both sides, that claims were made which have failed, and each party contends, that

1857.

MAY  
v.  
BIGGENDEN.  
CHEESEMAN  
v.  
MAY.



1857.  
  
 MAY  
 v.  
 BIGGENDEN.  
 CHEESEMAM  
 v.  
 MAY.

the other ought to pay the costs of this part of the case. The Plaintiff says, that Mr. *Biggenden*, by his cash account and by his letters prior to the institution of the suit, claimed to be entitled beneficially to one-half of this judgment, and the Defendant says, that the Plaintiff, by his bill, claimed to be the beneficial owner of the whole. I am of opinion that the judgment was bought by the trustees for the purpose of the trust, under the deed of 1844, and that, subject to discharging any specific lien arising from money advanced for that purpose, the proceeds of it must be applied according to the trusts of that indenture. Practically, under the trusts of the indenture, Mr. *May* is entitled to the whole of it, because it appears, that under that deed, Mr. *Biggenden* is a debtor for 345*l.* 11*s.* 6*d.*, and Mr. *May* is a creditor for 1,336*l.* 13*s.* 5*d.*, besides being a creditor on his general transactions with *Cheeseman* to the extent of 4,531*l.* 11*s.* 8*d.* In my opinion, however, the real contest between these parties was, whether the deed of 24th of *December*, 1844, was a valid and subsisting deed, and that this was the cause and origin of this contest. The decision of this point involved the question I have already mentioned, relative to the fifty bags of hops, whether they passed under the deed, or whether they were the property of *Cheeseman* at the time they were taken by *Oliver's* representatives, as constituting 1,000*l.*, part of the purchase-money for the judgment. The perusal of the pleadings and evidence satisfies me that this was the real contest, and this has been decided in favour of the Plaintiff Mr. *May*, and against the Defendant Mr. *Biggenden*, and it therefore follows, in my opinion, that the costs of this ought to be borne by the Defendant Mr. *Biggenden*.

It is contended by Mr. *Lloyd*, that besides the question

tion on this judgment, the Defendant has been successful on two other points, at least, and that the Plaintiff has put forth claims which he has failed in supporting. The more material of these is, that relating to the sale of the *Larkhall* estate, which rested on the agreement of the 28th of *March*, 1849, and which the Plaintiff, by his bill, prayed might be performed by the Defendant *Mr. Biggenden*, and further, that he might be decreed to accept an assignment from Messrs. *Mercer, Randell and Company* of the principal mortgage debt of 2,000*l.*, and thereupon to deliver up the title to the *Larkhall* estate to the Plaintiff, or to the purchaser; but I am of opinion, that this question was dependent on the state of the account between the Plaintiff and *Mr. Biggenden*, and that until that account had been taken, and the amount due upon it had been ascertained, the amount of the charge which *Mr. Biggenden* would be entitled to receive could not be ascertained. The delay, therefore, in the completion of the purchase, was really attributable to *Mr. Biggenden*, who claimed more than he was entitled to on the account, and in this respect, I am of opinion that this question is not separable from that question which arises on the general account between the parties. The same observations apply, generally, to the other point insisted upon by *Mr. Lloyd*, viz., the questions as to the special or general authority, given by *Mr. May* to *Mr. Biggenden*, to pay, on his account, debts due from *Cheeseman*. This question was inseparably mixed up with the account claimed, nor can I discover, that upon this particular point, any appreciable additional expense has been occasioned in the suit.

Both *Mr. Lloyd* and *Mr. Bazalgette* however contend, that, inasmuch as this is a bill for an account, and as nearly 2,000*l.* has, upon taking the accounts, been

1857.  
MAY  
v.  
BIGGENDEN.  
CHEESEMAM  
v.  
MAY.

1857.  
  
 MAY  
 v.  
 BIGGENDEN.  
 CHEESEMAN  
 v.  
 MAY.

been found to be due to Mr. *Biggenden*, the costs ought to follow the event, and that, upon the ordinary principles which govern the decisions of this Court relative to costs, the costs of this suit ought to be paid to Mr. *Biggenden*. But I dissent from the principle so stated. It is generally true, that if a suit is instituted for an account between two persons, one alleging that nothing is due from him, and a balance is found to be due from him, that person will have to pay the costs of the suit and of the account. But the case would be wholly varied, if the case were, that one party admitted a given sum to be due from him, and the other had claimed a much larger sum, and the suit had proceeded only for the purpose of ascertaining whether such contested balance were really due or not. In this case, the costs would depend upon the substantial result; that is, if the balance claimed, or a substantial part of it, were shewn to be due, the claimant would obtain the costs of the suit; if no part of it were due, he would have to pay them; and if only a small portion of it were due, the Court would probably give no costs on either side. But in all these cases, the Court endeavours to see what were the substantial questions and causes of litigation between the parties.

Here, Mr. *Biggenden* claimed, and brought an action for, 3,214*l*. I nowhere find, that the Plaintiff contested that a considerable sum was due to Mr. *Biggenden*; he contested his claim to be entitled to half the judgment: he contested his claim to any right to charge him with *Cheeseman's* costs, under the guarantee of *April*, 1847, and his solicitor wrote for explanations on these subjects; he also contested his right to the 430*l*. bill and the I. O. U. for 250*l*.: no explanation was given on these subjects, beyond a mere assertion, that Mr. *May* was perfectly well able to give the explanation himself,  
 and

and no abatement was made by Mr. *Biggenden* in his claim, nor any suggestion made, that by meeting and going through all the papers and documents together, the balance might be settled by arrangement. I am unable to see, having regard to the course adopted by Mr. *Biggenden*, what step Mr. *May* could have taken other than that of filing a bill in this Court. Substantially, he has, in my opinion, succeeded on all the points he contested in the account sent in to him; he has succeeded in establishing the validity of the deed of *December*, 1844, and that the fifty bags of hops passed under it; he has succeeded in establishing the invalidity of the guarantee of *April*, 1847, and that he was not liable for *Cheeseman's* costs; he has succeeded in shewing that he is not liable in respect of the bill for 430*l.* given to *Sedgwick*; that he is not liable for the 200*l.* claimed on the I. O. U. for 250*l.*; that he is not liable for the 91*l.* claimed for interest on the second bill of 500*l.*; that Mr. *Biggenden* ought not to have resisted the delivery up of the deeds of the *Larkhall* Estate, unless the whole amount claimed by him was paid or secured to him. Substantially, therefore, Mr. *May* succeeds on all the points in difference; and although, looking at the bill with the information now derived from the evidence since taken and the investigation it has since undergone, it is easy to point out inaccuracies in the statement of the Plaintiff's case, which, if the bill were now to be drawn, would probably, in these respects, be differently framed, still these are, in my opinion, rather matters of form than of substance, and I am of opinion, that upon the result of the whole matter, the suit has been occasioned by the ungrounded claims of Mr. *Biggenden*, and that he must pay the Plaintiff's costs of it.

With respect to the decree to be made on further directions, it will carry into effect the certificate of the  
Chief

1857.  
MAY  
v.  
BIGGENDEN.  
CHEESEMAM  
v.  
MAY.

1857.  
  
 MAY  
 v.  
 BIGGENDEN.  
 CHEESEMAN  
 v.  
 MAY.

Chief Clerk, ordering payment to Mr. *Biggenden* of so much of the fund in Court as represents the principal and interest derived from the first sum of 1,972*l.* 6*s.* 11*d.* paid into Court, subject, however, to certain deductions.

In the first place, I am of opinion, that Mr. *Biggenden* is entitled to set off the 221*l.* 3*s.* due to him on the private account with Mr. *Cheeseman*, against the 345*l.* 11*s.* 6*d.* due from Mr. *Biggenden* on the trust account; and that the balance of 124*l.* 10*s.* 10*d.* is to be taken as part payment of the balance due to him, and therefore to be deducted from the sum to be received; and also that the Plaintiff's costs of the suit must be deducted from the sum in Court to be paid to the Defendant *Biggenden*. The residue of the sum in Court will be paid out to the representatives of Mr. *May*.

I have said nothing hitherto respecting the suit of *Cheeseman v. May*—in fact, little can be done in it; because the insolvency of *Cheeseman*, and the absence of any assets of his, render it impossible to do justice to his creditors; but the decretal order I now make, which is to be entitled in both suits, must go on to direct payment to Mr. *May's* representatives of the balance found due to Mr. *May*, together with the costs of that suit, out of any assets or estate of Mr. *Cheeseman*, when, if ever, any such shall fall in; and also payment of the costs of the suit to Mr. *Biggenden*. If any estate of *Cheeseman* should be got in, applicable to this purpose, but not sufficient to pay the whole, it must be applied, rateably, between both parties.

At the hearing of this cause, I stated, that in my opinion, Mr. *Biggenden* was not entitled to take the  
 balance

balance of 124*l.* 10*s.* 10*d.* in part payment of his costs of that suit; and I also stated, that Mr. *May* was not entitled to be allowed, in the first instance, out of the trust estate, the expenses incurred by him in the management and cultivation of the farm, which formed a portion of the trust property, but the cultivation and management of which were not part of the duties or trusts which, under that deed, were imposed on him.

1857.  
MAY  
v.  
BIGGENDEN.  
CHEESEMAN  
v.  
MAY.

This will dispose of all the questions in this suit, and it will only be necessary to reserve liberty to apply.

FULLER v. GREEN.

THIS suit was instituted by a judgment creditor of the intestate against the legal personal representatives.

Feb. 19.  
A creditor's suit having been instituted after a statement by the legal personal representatives that there were no assets, which statement turned out to be true, the Plaintiff was ordered to pay the costs.

The bill stated, that the Defendant alleged that the estate was insolvent. A decree was made for taking the accounts, but nothing was found due from the Defendant.

There being no estate, the question now was, who was to pay the costs of the suit.

Mr. *Palmer* and Mr. *Hingston*, for the Plaintiff.

Mr. *Nalder*, *contrò*, was not heard.

The MASTER of the ROLLS.

This is a very unfortunate case, but how is an executor

1857.

~  
FULLER  
v.  
GREEN.

ecutor to be protected? The Plaintiff, in spite of the representations of the Defendant, makes a claim against the executor and puts him to costs. It turns out that the executor has told the truth, and that there is nothing due from him. He surely must be indemnified, otherwise he might be mulcted over and over again. I regret to say that the Plaintiff must pay the costs of the suit.

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NOTE.—See *Bluett v. Jessop*, Jacob, 240; *King v. Bryant*, 4 Beav. 460; *Ottley v. Gilby*, 8 Beav. 602.

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## SPARKS v. RESTAL.

Feb. 24.

Bequest to A. for life, and after her death, to B. and C. "or" their children. B. and C. survived A. Held, that their children took nothing.

Bequest to A. for life, and in case he should die without child or children, then to B. Held, that the children took nothing by implication.

THE testator bequeathed to his daughter, *Ann Sparks*, an annuity of 20*l.* during her natural life, and from and after her decease he gave "the said annuity or the value unto *Ann Sparks* (the daughter) and *Matthias Sparks*, or their child or children, lawfully begotten, share and share alike."

*Ann Sparks*, the daughter, and *Matthias Sparks*, survived *Ann Sparks*, the tenant for life; and the first question was, whether their children took any interest in the annuity.

The testator also bequeathed to his son, *William Restal*, an annuity of 25*l.* a year during his natural life, "and in case his said son *William* should die without child or children, lawfully begotten, and from and after his decease," that being the case, he gave "the said annuity or value unto *Ann* and *Matthias Sparks*, and their child or children, lawfully begotten, share and share alike."

The

The second question was, whether the children, if any, of *William Restal* took any interest in the annuity of 25*l.*

1857.

*SPARKS*  
v.  
*RESTAL.*

Mr. *R. Palmer* and Mr. *G. Hastings*, for the Plaintiff. The first gift to *Ann Sparks*, the daughter, and *Matthias Sparks*, or their children, is a substitutional gift to the children, which takes effect only in case their parents should die in the life of the tenant for life, and as that event has not happened, the children take nothing. Secondly. There is no gift of the second annuity of 25*l.* to the children of *William Restal*, even by implication; *Addison v. Bush* (a).

Mr. *W. H. Clarke*, for *William Restal*.

Mr. *Bevir*, for *Hester Restal*.

Mr. *C. Hall*, for assignees.

The MASTER of the ROLLS.

In the event which has happened, the children of *Ann Sparks*, the daughter, and of the Plaintiff *Matthias*, take no interest in the first annuity.

It is also clear, on the terms of the will, that the children of *William* take no interest in the second annuity.

(a) 14 *Beav.* 459.



1857.

*Re* BREALY'S SETTLED ESTATES.*Re* HADWEN'S SETTLED ESTATES.*Re* MANSON'S SETTLED ESTATES.*Re* FOSTER'S SETTLED ESTATES.

May 22,  
May 29,  
June 23.

Practice under  
the Settled  
Estates Leases  
and Sales Act.

Where a  
married wo-  
man is the  
Petitioner, her  
consent, under  
the 19 & 20  
*Vict. c. 120*,  
ss. 37, 38,  
should be  
taken subse-  
quent to the  
petition being  
answered, but  
before any  
further pro-  
ceeding, and  
an independ-  
ent solicitor  
should take  
her consent.

THESE were four distinct applications, but the ques-  
tions in all arose on the Settled Estates Leases  
and Sales Act (19 & 20 *Vict. c. 120*), and related to the  
time at which it was necessary to take the consent of a  
married woman to an application, under the Act, made  
in her name.

The 37th section of the 19 & 20 *Vict. c. 120*, is as  
follows:—"Where a married woman shall apply to the  
Court, or consent to an application to the Court, under  
this Act, she shall *first* be examined, apart from her  
husband, touching her knowledge of the nature and  
effect of the application, and it shall be ascertained that  
she freely desires to make or consent to such appli-  
cation."

The 38th section is in these words:—"The examina-  
tion of such married woman shall be made either by the  
Court, or by some solicitor duly appointed by the Court  
for that purpose, who shall certify, under his hand, that  
he has examined her apart from her husband, and is  
satisfied that she is aware of the nature and effect of  
*the intended application*, and that she freely desires to  
make or consent to the same."

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*In re BREALY'S SETTLED ESTATES, and*  
*In re HADWEN'S SETTLED ESTATES.*

1857.  
May 22.  
May 29.

Mr. *Southgate* appeared in the former case, and

Mr. *Wickens* in the latter.

*The MASTER of the ROLLS* considered, that as the Act required the married woman to be "*first*" examined (s. 37), and be then made aware "of the nature and effect of the *intended application*" (s. 38), her examination must necessarily precede the presentation of a Petition in her name:—That these sections must, therefore, mean this:—that before any proceedings should be taken by anybody in her name, her knowledge and consent should be certified.

His Honor was also of opinion, in both these cases, that the solicitor appointed to take the examination should be an independent solicitor (*a*), and not one concerned in the proceeding.

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*In re MANSON'S SETTLED ESTATES.*

June 23.

Mr. *R. Palmer* and Mr. *Hamilton Humphreys* applied to the Court in this case. They pointed out, that the solicitor could not be "*duly appointed*" by the Court, until the petition had been presented, for until that step had been taken, the Court had acquired no jurisdiction in the matter. They stated, that in *Re Hooper's Settled Estates* (*b*), Vice-Chancellor *Wood* had

(*a*) See *Turner v. Turner*, L. C. and L. J., Feb. 25, 1858.  
(*b*) June 8, 1857.

1857.

*In re*  
MANSON'S  
SETTLED  
ESTATES.

had made the order appointing a solicitor immediately after the presentation of the petition, and they asked for a similar order.

*The MASTER of the ROLLS* said the matter was one of great importance, as affecting the title under the proceeding, and although he thought it doubtful, whether a good title would be obtained, he would make an order similar to that in *Re Hooper*, but at the Petitioner's risk.

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June 23.

*In re FOSTER'S SETTLED ESTATES (a).*

The petition had been presented by a married woman, and the advertisement had been already inserted.

Mr. *Martineau* applied to appoint a solicitor to take her consent.

*The MASTER of the ROLLS* said he would make the same order as in *Re Manson*, and to avoid difficulty in future, he would appoint a solicitor to take the married woman's consent, after the presentation of the petition, but before any advertisement.

(a) The case of *In re Forster's Settled Estates* was afterwards brought before the Lords Justices, who settled the practice, that the consent should be taken immediately after the petition had been answered, but before the advertisement had issued. 3 *Jur. N.S.* 833.

1857.

## ROBERTS v. CROFT.

July 2.

**T**HE question, in this case, was as to the priority of two equitable mortgagees of real estate, one of whom had a portion only of the title deeds, and the other the remainder. To explain the point, it is necessary to state, shortly, the nature of the title to the property.

From the year 1768 (which was the date of the first title deed) to 1833, the estate had belonged to a family named *Williams*, subject to a mortgage for 1,300*l.* to *Hughes*, created in 1826.

In 1833, the property was bought by and conveyed to *Roberts*, a solicitor, to whom the mortgage was afterwards transferred.

In 1838, *Roberts*, who was the confidential solicitor of Miss *Willis*, borrowed of her the sum of 2,000*l.*, and he deposited with her the deed of 1768 and ten others of subsequent date (the last being the mortgage of 1826 to *Hughes*) as a security. At the foot of the list of the deeds so deposited was a memorandum, which was as follows:—"The above-mentioned deeds are deposited with Miss *Ann Willis* as a security for the sum of 2,000*l.* and interest at the rate of 4*l.* 10*s.* per centum per annum, to be held by her until repayment of the same, with all costs, charges and expenses which may hereafter be occasioned by nonpayment of such principal money and interest as aforesaid. As witness my hand, this 6th day of *March*, 1838. — *Charles R.*

VOL. XXIV.

Q

*Roberts.*"

To constitute a good equitable mortgage it is not necessary that the deeds deposited should shew a good title in the depositor.

A solicitor made an equitable deposit of the title deeds of his estate to a client, omitting the conveyance to himself. He afterwards deposited the latter, as a security, with his bankers. Held, that the client had priority over the bankers.

1857.

ROBERTS  
v.  
CROFT.

*Roberts.*" On this occasion, no other solicitor than Mr. *Roberts* had been employed.

In 1839 *Roberts*, being indebted to Messrs. *Bult*, his bankers, agreed to deposit the title deeds of his estate as a security, and on the 28th of *March*, 1839, he sent them a copy of the deed of 1768, together with the deed of 1833, whereby the estate had been conveyed to him, and the transfer of the mortgage from *Hughes*. He, at the same time, sent them a letter, saying,—“ I herewith send you my title deeds, which you will hold as a security on my account.”

By consent, the estate had been sold and the money brought into Court, and the question now was, which of these two equitable mortgages had priority.

Mr. *R. Palmer* and Mr. *Goldsmid*. Messrs. *Bult* are entitled to rank as the first incumbrancers on the produce of the estate; though the charges are both equitable, their priorities are not according to the priorities of their dates. In *Rice v. Rice* (a), Vice-Chancellor *Kindersley* refers to the rule in these terms:—“ What is the rule of a Court of Equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form:—‘ As between persons having only equitable interests, *qui prior est tempore potior est jure*.’ This is an incorrect statement of the rule; for that proposition is far from being universally true. In fact not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal; as in the

(a) 2 *Drew.* 76.

the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it."

1857.

ROBERTS  
v.  
CROFT.

"Another form of stating the rule is this:—'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*.' This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity'? For example, when we say that *A.* has a better equity than *B.*, what is meant by that? It means only that, according to those principles of right and justice which a Court of Equity recognizes and acts upon, it will prefer *A.* to *B.*, and will interfere to enforce the rights of *A.* as against *B.* And therefore it is impossible (strictly speaking) that two persons should have equal equities except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal; *i. e.*, in other words, how can it be said that the one has no better right to call for the interference of a Court of Equity than the other? To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this:—"As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure*."

1857.

ROBERTS  
v.  
CROFT.

The title deeds deposited with Miss *Willis* shew no title in the depositor Mr. *Roberts*, but in another person. The estate, so far as appears from the deeds deposited with her, would appear to belong to the family of *Williams* and their mortgagee, and it might have belonged to a client of *Roberts*. On the other hand, Messrs. *Bult* have the substantial deeds which govern the title of *Roberts*, namely, the conveyances to him. Although she had not actual notice of the state of the title of *Roberts* to the property, she ought to be treated as if she had, if "the circumstances are such as enable the Court to say, not only that she might have acquired, but also that she ought to have acquired, the notice with which it is sought to affect her :—that she would have acquired it but for her gross negligence in the conduct of the business in question;" *Ware v. Lord Egmont* (a).

Miss *Willis*, having employed no other solicitor on the occasion, is affected with notice of all that was known by *Roberts* at the time of the transaction. "It is quite settled in this Court, that if a party in dealing for a property employ an agent who has any knowledge of an incumbrance affecting that property, in law his knowledge is communicated to the principal; and although the latter may be wholly unconscious of the existence of the incumbrance, he is held to be affected with notice, and is, therefore, bound;" *Marjoribanks v. Hovenden* (b). The rule is, that "if the same person is agent both for the vendor and purchaser, or is himself vendor and agent for the purchaser, whatever notice he may have will affect the purchaser; and a purchaser taking a conveyance from a vendor, who has not possession of the title deeds, will take it with notice of any claim

(a) 4 De G., M. & G. 473.

(b) *Drury*, p. 18.

claim which the party in possession of the title deeds may have;" *Dryden v. Frost*(a); *Atterbury v. Wallis*(b).

1857.

ROBERTS  
v.  
CROFT.


Miss *Willis* must, therefore, be taken to have known that *Roberts* retained in his possession the conveyance to himself.

Miss *Willis* must, consequently, be taken to have known, that the principal deed conveying the property to *Roberts* was withheld by him, by means of which he was afterwards enabled to commit a fraud. Her gross negligence in not inquiring for the remainder of the title deeds is a sufficient ground to postpone her to Messrs. *Bult*. In *Worthington v. Morgan*(c), a mortgagee having the legal estate was postponed to a prior equitable charge, on the ground that he had not required to see the title deeds of the estate, or to see or inspect the conveyance to the mortgagor. In *Colyer v. Finch*(d), Lord *Cranworth* thus states what circumstances will amount to or be evidence of "gross negligence." He says, "I think that *primâ facie* a mortgagee who, knowing that his mortgagor has title deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he has thus enabled his mortgagor to commit."

In *Waldron v. Sloper*(e), *Matthews*, an equitable mortgagee, had, in *January*, 1840, deposited the deeds with *Waldron*, by way of equitable mortgage. In *April*, 1842, *Matthews* applied to *Waldron*, for the loan of the deeds, telling him he wanted them to enable a purchase to be completed, and promising to return them forthwith.

(a) 3 *Myl. & Cr.* 670.(d) 5 *H. L. Cas.* 928.(b) 2 *Jur. (N. S.)* 343, 1177.(e) 1 *Drew.* 193.(c) 16 *Sim.* 547.



1857.  
  
 ROBERTS  
 v.  
 CROFT.

forthwith. He did not return them, nor did *Waldron* apply for them for more than four years. In *May*, 1843, *Matthews* deposited the deeds, by way of mortgage, with *Pinckney*, who now held them. It was held, that *Waldron* was to be postponed to *Pinckney*. The Vice-Chancellor *Kindersley* (a) observing :—" It is an elementary principle, that a party coming into equity, in such a case, is bound to shew that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the Plaintiff's right, as to induce an innocent party to assume that he was dealing with his own." He concluded thus :—" If ever there was a case in which, as between two innocent parties, that one must suffer who has permitted the fraud to be committed, it is this case, and I am of opinion that *Waldron*, who by his great neglect put it in the power of *Matthews* to commit the fraud, has no right to come and ask equity to interfere."

Sir George *Turner* in *Hewitt v. Loosemore* (b), thus states the rule :—" The law, therefore, as I collect it from the authorities, stands thus :—That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title deed, unless there be fraud or gross and wilful negligence on his part. That the Court will not impute fraud, or gross or wilful negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them, but that the Court will impute fraud or gross and wilful negligence to the mortgagee, if he omits all inquiry as to the deeds. And I think there is much principle both in the rule and the distinctions upon it."

They

(a) 1 *Drew.* 200.

(b) 9 *Hare*, 458.

They also cited *Ex parte Pearse* (a), *Ex parte Coombe* (b) and *Jones v. Williams* (c).

1857.

ROBERTS  
v.  
CROFT.

Mr. Selwyn and Mr. Baggalay, for Miss Willis, were not called on.

*The MASTER of the ROLLS.*

I think there is nothing displacing the title of Miss Willis. I consider the question of priority to stand thus:—*Primâ facie*, the person who advances his money first is entitled to be paid first, and the burthen lies on the subsequent incumbrancers to displace that *primâ facie* right. It may be displaced, and there are many things which may disentitle the first incumbrancer so that priority, which in order of time he would otherwise enjoy. Here the burthen of proof lies on Messrs. Bult to displace the title of Miss Willis.

The first question I have to consider is, whether she has any title at all, and the next is, whether there are any circumstances which give Messrs. Bult priority over her. These cases must be regarded in two points of view: first, as between the equitable mortgagee and the depositor, and next as between the equitable mortgagee and strangers.

I held, in *Jones v. Williams* (c), that the deposit of deeds could not create an equitable mortgage on property to which they did not relate; that is, if the owner deposited the title deeds of *Blackacre* with A., assuring him, at the time, that they were the title deeds of *Whiteacre*, but to which, in reality, they did not relate, that this would not create an equitable mortgage on

(a) *Buck*, p. 525.  
(b) 4 *Madd.* 249.

(c) 24 *Beav.* 47.

1857.

ROBERTS  
v.  
CROFT.

on *Whiteacre*. This Court would, under another head of equity, compel the depositor to make good his words, but the deposit did not create an equitable mortgage, or affect third parties with whom the owner of the property had afterwards deposited the title deeds of *Whiteacre*, and to whom he had thereby given an equitable mortgage on that property. I state this to explain the principle on which I proceed.

In this case, the first question is this : was the deposit made to Miss *Willis* such, that, as between her and *Roberts*, it was sufficient to create an equitable mortgage on the property? In the list of deeds deposited with Miss *Willis*, I find a long series of deeds from the earliest root of the title to *December*, 1826, all of which relate to the property; but the deed which creates the title in *Roberts* is omitted. Would the deposit of those deeds create a good equitable deposit as against *Roberts*? I am of opinion that as against him it would create a good equitable mortgage.

Subsequently, *Roberts* deposits the remaining deed with Messrs. *Bult*, and I think that this also would create a good equitable deposit, as between *Roberts* and Messrs. *Bult*. That being so, the question then is, which of these two equitable mortgages is to have priority? If both are good, then unless there be some circumstance to induce the Court to arrive at a contrary conclusion, the priority of date must prevail. According to *Rice v. Rice* (a) there must be some other fact or circumstance to disentitle Miss *Willis* to priority as against Messrs. *Bult*.

I am of opinion, that it would drive the Court into questions which would almost be insoluble, and render equitable

(a) 2 *Drew.* 73.

equitable mortgages of no value, if it should be held that no equitable mortgage was good, unless the deeds deposited shewed a good title in the depositor. In that case it would be as necessary for the lender to go through the title, in the case of an equitable as in that of a legal mortgage, and the difficulties would be greater, for a legal mortgagee may accept what title he pleases, but if the deposit do not constitute an equitable mortgage unless a good title be shewn by the deeds deposited, the Court, and not the lender, must judge of the sufficiency of the title. If it be shewn, that the deeds deposited *bonâ fide* relate to the property, that constitutes a good equitable mortgage, and priorities must depend on dates, for, otherwise, the Court would have to determine which of the two deposits would shew the better title, a species of inquiry which it would be impossible to enter into with any chance of arriving at a satisfactory conclusion.

1857.

ROBERTS  
v.  
CROFT.

I do not, therefore, consider the circumstance, that the title deeds deposited with Miss *Willis* do not shew *Roberts'* title to the property, such as to disentitle her to priority over Messrs. *Bult*.

There was no fraud : was she guilty of such negligence as to disentitle her ? All she did was not to inquire for the subsequent deeds which created the title of *Roberts*. I admit the view taken by Mr. *Goldsmid*, that not having employed a solicitor she is to be treated in the same way as if she had employed one. But, on the other hand, what inquiry did Messrs. *Bult* make ? They had the deeds of 1768 and 1833, and there were several other intermediate deeds recited in the latter : did they make any inquiry after them ? They knew there were various deeds between 1768 and 1826, and they made no inquiry as to what had become of them. On this ground, therefore, they and Miss *Willis* seem to stand

1857.

ROBERTS  
v.  
CROFT.

stand on a similar footing; if either had inquired, they would have received an answer that the deeds deposited were not all. I must assume they would both have received the true answer, if inquiry had been made.

In this state of things, I see nothing to postpone *Miss Willis*, either on the ground of negligence or of fraud; but her deposit having priority in point of time, and being a good equitable mortgage as against *Roberts*, it keeps its place in the absence of any fact to displace it. The burthen of shewing the contrary lies on Messrs. *Bult*, and they have failed in doing so.

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Affirmed by Lord Cranworth, 10th December, 1857.

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April 29, 30.

May 22, 28.

An account between *A.* and *B.* having been settled, *A.* executed a general release to *B.* Held, that the account could not be opened by *A.*, on the ground of usury, until the release had been set aside, and that the release could not be set aside on the mere ground of usurious items having entered into the account, of which both parties were cognizant.

Observation on the application of the doctrine of undue influence.

#### FOWLER v. WYATT.

THE Plaintiff a builder, and the Defendant a retired architect, had various building speculations and money transactions, commencing in the year 1849. The general effect of which was as follows:—In *July*, 1849, *Wyatt* obtained a building lease of a house and premises in *Grosvenor Street*, which were in a dilapidated state. On the 1st of *August*, 1849, he assigned the lease to *Fowler*, in consideration of 2,550*l.* 16*s.* who, on the same day, sub-demised it to *Wyatt*, to secure his advances, *Wyatt* taking upon the occasion a considerable *bonus*, beyond 5*l.* per cent., for the loan. *Fowler* rebuilt the premises by means of this and further advances of money made to him from time to time by *Wyatt*, and for which other mortgages were given.

In *August*, 1850, the parties agreed to settle their accounts and to execute a release in respect of this transaction. Accordingly, an indenture, dated the 12th of *August*, 1850, was made between the Plaintiff

*Fowler*

*Fowler* of the one part, and the Defendant *Wyatt* of the other part, reciting these various matters, and that "all accounts between *Wyatt* and *Fowler*, relating to or concerning the leasehold premises in *Grosvenor* Street, and the various sums advanced on the security thereof, and the various transactions concerning the same (except the legal expenses incurred in and about the preparation and execution of the several thereinbefore recited mortgage securities, which expenses had not been paid by *Fowler*), had been finally settled and adjusted, and that an account, including all such accounts (except such last-mentioned legal expenses) had been stated, settled and signed by *Wyatt* and *Fowler*, and was annexed as a schedule thereto (the correctness of which accounts, in all respects, *Wyatt* and *Fowler* did thereby respectively admit and acknowledge); and reciting that *Fowler* had agreed to give to *Wyatt* such release as is thereinafter contained: it was witnessed, that *Fowler* released, &c., *Wyatt* from all actions, &c., claims and demands whatsoever "for or on account or in respect of, or in anywise relating to, the leasehold hereditaments comprised in the recited indenture of lease of the 24th day of *July*, 1849, or the said principal sums of 3,600*l.*, 2,000*l.* and 3,475*l.*, or any of them or any part thereof respectively, or the interest of the said three principal sums, or any of them, or any part or parts thereof respectively, or any sums paid in lieu of such interest or any part or parts thereof, or for the advancing of or forbearing payment of the said principal sums, or any of them, or any part or parts thereof respectively, or any other matters or thing whatsoever thereinbefore mentioned or referred to, or any such matters or things."

1857.

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FOWLER  
v.  
WYATT.

The schedule set out the accounts between the parties,

1857.

FOWLER

v.

WYATT.

ties, and was signed, as "examined and approved" of, by *Fowler*.

By indenture of even date (12th of *August*, 1850), *Fowler*, in consideration of 3,745*l.* due from him to *Wyatt*, and of 708*l.* paid by him, assigned the premises to *Wyatt*, subject to two mortgages of 3,600*l.* and 2,000*l.* thereon, vested in *George Dodd*, and against which *Wyatt* covenanted to indemnify *Fowler*.

In *January*, 1852, the Plaintiff filed this bill, which was of great length; it in substance prayed a general account of all transactions and dealings between *Fowler* and *Wyatt*; that the release of the 12th of *August*, 1856, might be set aside, and that the several mortgage deeds might also "be set aside on the ground of usury," fraud and undue advantage taken by the Defendant of the Plaintiff.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Tripp*, for the Plaintiff, argued, that *Wyatt* having stipulated for a *bonus* for his cash advances, beyond 5*l.* per cent. interest, the transactions under the laws then in force (1849) was void for usury. Secondly, that the release and settled account were equally void on the same ground, for they still included the objectionable items, and were likewise tainted with the usury.

They asked a decree for a general account of all dealings and transactions between the parties, with a declaration that the Plaintiff was only to be charged with the sums *bonâ fide* advanced, with lawful interest, and that, in taking such accounts, the deeds were only to be treated as securities for money *bonâ fide* advanced

or

or applied for the benefit of the Plaintiff. They cited *Belcher v. Vardon* (a); *Doe v. Chambers* (b); *Doe v. Gooch* (c); *Chapman v. Black* (d); *Wicks v. Goggerley* (e); *Harrison v. Hannel* (f); *Colman v. Mellersh* (g); *Drew v. Power* (h); *Molloy v. Irwin* (i).

1857.

~  
FOWLER  
v.  
WYATT.  
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Mr. Lloyd and Mr. Jessel, for the Defendant, were not heard.

*The MASTER of the ROLLS.*

The examination of the papers, in this case, has brought me to the conclusion, that I cannot give the Plaintiff any relief. The allegation that the Plaintiff was the agent of Wyatt in the whole transaction is completely displaced by the Plaintiff's cross-examination, and cannot be supported. As to the question of usury, I am of opinion that various of the items are open to this objection, and to that extent the Plaintiff is entitled to the opinion of the Court in his favour.

If there be an account settled between parties, and items are pointed out shewing that usurious interest has been charged, various cases shew that this would be a sufficient ground for opening that account. But this case is not one of that description. It is a transaction which took place in August, 1850, in which accounts between the parties are delivered, and, having carefully read through the evidence, I am convinced that the Plaintiff perfectly well knew what he was about at the time of the delivery of the accounts to him. The parts  
of

(a) 2 Coll. 162.

(b) 4 Campbell, 1.

(c) 3 B. & Ald. 664.

(d) 2 B. & Ald. 588.

(e) Ryan & Moo. 123.

(f) 1 Marshall, 349.

(g) 2 Mac. & Gor. 309.

(h) 1 Sch. & Lef. 182.

(i) 1 Sch. & Lef. 310, and see the notes to 3 Chitty's Statutes, 1501 (2nd edit.)



1857.

~  
FOWLER  
v.  
WYATT.

of the accounts that were stated to be in blank, and which were afterwards written in red ink, are really of no importance whatever; they were matters which could only be in the knowledge of the Plaintiff: but in addition to that, it is not now pretended that those items are incorrect in amount, and the only matter left in blank was the amount. The nature and character of the items were all specified in the accounts, so that it is merely drawing the conclusion which results from the whole when the blanks are filled with figures, the correctness of which is not disputed. In that state of the case, the Plaintiff executed a formal release of all his claims against the Defendant in the fullest and most usual form, which expressly settles all matters of account between the parties. Not only is it not disputed at the Bar, but I apprehend that it is an indisputable rule of law, that if two parties are perfectly cognizant of what the state of the matter between them is, and know that there are items which may be disputed, and if, after this, they think fit to settle the account, to allow these items, and to grant a release in respect of them, that account can only be opened afterwards, not in the ordinary manner of opening an ordinary settled account, but by setting aside the deed of release. Accordingly this bill, for that purpose, very properly prays that the deed of release may be set aside; that was the proper course for the Plaintiff to take, and it is a necessary preliminary step to get at the taking of these accounts that the release should be set aside, and if the release cannot be set aside the accounts cannot be allowed to be taken.

I do not observe, in the prayer of the bill, any offer to pay what shall be found to be actually due from the Plaintiff upon taking the account. In all cases in which this Court sets aside any transactions on the ground of  
usury,

usury, it requires the Plaintiff to undertake to pay what, if anything, shall be found *bonâ fide* to be due upon taking the accounts. I do not think that omission would be material, if I could arrive at the conclusion that the accounts ought to be taken, because, although there be no such offer by the bill, I should compel the Plaintiff to enter into such an undertaking before I gave him any decree to take the accounts. But, as I have already stated, the release must be set aside before that can be allowed. The release can only be set aside upon one or two grounds, either that it was obtained by fraud, or that it was obtained by undue influence; both of which grounds are raised in this bill.

I think that no case whatever of fraud has been established. There is no proof of any statement by the Defendant of what was false, there was no suppression by him of what was true; and the Plaintiff was as fully cognizant of all the transactions as the Defendant himself.

With respect to undue influence, the case completely fails; the whole of the ground upon which undue influence is sought to be inferred here is derived from the mere circumstance of the Plaintiff having executed the release itself. I have undoubtedly, on many occasions, expressed my opinion, which I have retained up to the present time, that undue influence does not necessarily and exclusively spring out of the peculiar relations referred to in the books, such as that of parent and child, guardian and ward, solicitor and client, and the like; but that wherever the Court finds one of two persons exercising undue influence over the other, it will not allow a transaction resulting from or produced by it to stand. The relevancy of the relation of parent and child, guardian and ward, and the like, in such cases,

1857.

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FOWLER  
v.  
WYATT.

1857.

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FOWLER  
v.  
WYATT.

cases, is this: that from that relation it flows, as a necessary consequence, that a considerable degree of influence must exist, and if unduly exerted, then this Court interferes. But in this case, where you have two gentlemen actively engaged in business, both competent to carry on an active and thriving business, it requires very strong evidence to explain how it is that the one should have obtained this peculiar influence over the mind of the other. I find nothing of that sort in the present case. I am satisfied that there is a great deal in the back ground that I do not know of between these parties; but I also feel equally satisfied, that every thing was equally known to both parties, and that there was nothing in the peculiar nature of the transactions between them which could have enabled the Defendant, by the mere force of his influence over the Plaintiff, to induce him to do anything which the Plaintiff, at the time, did not believe to be for his own benefit and interest. I believe that he thought, at the time, and I am not sure that it might not have been so, that it was for his interest to execute that release. I think, therefore, that the case fails upon that ground, and that no case is made for setting aside the release. That being so, the whole of the case made by the Plaintiff, in my opinion, falls to the ground, and I cannot grant him any relief.

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*Affirmed by Lord Cranworth, L. C., 16th January, 1857.*

1857.

SARAH, the Wife of BARON D'OECHSNER, by  
John Holt her next Friend, v. SCOTT and Others.

May 23, 27.

**BY** the marriage settlement of the Plaintiff, some property was vested in two trustees, in trust "for her own sole, separate and inalienable use," independent of any husband, for life, with remainder to her husband for life, with remainder to the children of the marriage.

Property was settled to the separate and inalienable use of a married woman for life, and the trustees were authorized, out of the monies which should come to their hands, to reimburse themselves all expenses to be incurred in or about the execution of the trusts or any matter relating to the settlement. A bill filed by her by her next friend, complaining of a breach of trust, and to remove the trustees, was dismissed with costs, but, by consent, new trustees were to be appointed, and a Receiver to get in the income. Before new trustees had

In 1850, she filed her bill against the trustees, seeking to make them liable for an alleged breach of trust, and to have new trustees appointed. At the hearing in June, 1856, so much of the bill as related to the alleged breach of trust was dismissed with costs, and, by consent, the trustees were removed and two new trustees were ordered to be appointed. A receiver was also directed to be appointed, with direction to pay his balances into Court, and further directions were reserved. The Plaintiff appealed, but her appeal was dismissed with costs.

The costs were taxed at 162*l.*, and *John Holt*, being pressed for payment, took the benefit of the Insolvent Act. He had no assets, and turned out to be a mere cutter to an army clothier, at a weekly salary of thirty-six shillings.

No

When appointed and the costs paid by the next friend, he became insolvent. Held, that the income in the hands of the Receiver was applicable to the payment of the trustees' costs.

The next friend of a married woman having become insolvent, the proceedings were stayed.

CASES IN CHANCERY.

1857.

ORCHENBER  
v.  
SCOTT.

No new trustees had as yet been appointed, but the receiver had been appointed and had in his hands a balance of 174*l*. The cause had not yet been heard on further directions.

The two original trustees now presented a petition, praying that the receiver might, out of the money in his hands or to be received by him, pay them the 162*l*., the amount of their taxed costs and their costs of this petition; or that the Petitioners might be at liberty to sell sufficient of the trust funds standing in their names, for that purpose; that *John Holt* might be removed from being next friend, and that the Plaintiff might be ordered to find some other person, of good and sufficient means, to act as her next friend; and that in the meantime all further proceedings might be stayed.

Mr. *R. Palmer* and Mr. *Burdon*, in support of the petition, cited *Murray v. Barlee* (a) on the first point, and *Barlee v. Barlee* (b) on the second.

Mr. *Giffard* and Mr. *Fischer* for the Plaintiff, insisted that the restriction against alienation prevented the application of the income received since the decree to the payment of the Defendant's costs.

Mr. *Jolliffe*, for a child of the marriage, asked for costs.

The MASTER of the ROLLS reserved judgment.

(a) 4 Sim. 82, and 3 Myl. & K. 209.

(b) 1 Sim. & St. 11

*The MASTER of the ROLLS.*

1857.

I have read the Plaintiff's marriage settlement; I am of opinion, that it precludes any question from arising, with respect to the effect of the limitation to the Plaintiff's separate use without power of anticipation. But for this, a nice question might arise, as to which I am unwilling to express any opinion.

D'OECHEMER

v.

SCOTT.

May 27.

The old trustees have not yet been finally discharged, no new trustees having been appointed; but the receiver has received certain moneys, which, in my opinion, are applicable to the purpose of indemnifying the trustees. There are several passages in the settlement which tend to this result, but it is sufficient to refer to these:—"And it is further declared, that the trustees or trustee hereof, for the time being, may insure against loss or damage by fire, in any insurance office in London or Westminster, all or any of the said trust premises, and may rebuild, repair and keep repaired the same premises, or any part thereof, and pay any moneys for fines for renewal of leases of the said premises, or other charges attending the same, and may reimburse themselves and himself, out of the first moneys that may come to hand, all moneys expended for those purposes, or any expenses or disbursements incurred or paid by them in the execution or supposed execution of the trusts of these presents, and may sell, or mortgage, or charge with the repayment of any moneys expended as aforesaid, all or any part of the said trust premises, for the purposes of reimbursing themselves or himself, or to enable them or him to make any such payments as aforesaid, but the costs of insurance and repairs shall be considered as primarily payable by the usufructuary of the premises."

There is a subsequent passage which is as follows:—

R 2

"And

1857.  
D'OECHENER  
v.  
SCOTT.

"And it is hereby lastly declared, that the trustees or trustee hereof, for the time being, *may reimburse themselves and himself, out of the moneys which shall come to their or his hands* under the trusts aforesaid, all expenses to be incurred in or about the execution, or supposed execution, of the aforesaid trusts, or by reason of any matter or thing whatsoever relating to or connected with these presents."

Here is a suit instituted against them in respect of their execution of the trusts of this settlement, and they must be at liberty to deduct the costs they have incurred out of the first moneys which come to their hands. Then the question is, if this is money come to their hands? If other trustees had been appointed, so that the trust moneys could no longer come to the Petitioner's hands, a technical question of some nicety might arise, but here the money is in the hands of a Receiver, and I must treat it as money in the hands of the trustees. These costs must, therefore, be paid out of this money, as far as it extends. I do not intend to direct anything further.

The proceedings must be stayed until a solvent next friend is appointed, or until the Plaintiff obtains leave to sue *in formâ pauperis*.

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1857.

## ABADOM v. ABADOM.

June 26.

ON the 10th of *November*, 1856, *Elizabeth Frankish*, who had been long in delicate health, made an affidavit on behalf of the Plaintiff, but it was not then filed. She died on the 10th of *May*, 1857, and on the 22nd of *May*, the day appointed for closing the Plaintiff's evidence, the Plaintiff filed the affidavit.

An affidavit was made in favour of the Plaintiff, who, after a long delay, filed it after the death of the witness, whereby no cross-examination could be had. A motion to take it off the file was refused, though the Court intimated that it would have less weight.

Mr. *Lloyd* and Mr. *T. H. Terrell* moved to take the affidavit off the file. They contended, that it was improper for a party to keep an affidavit in his possession, as a private document, without filing it, and that filing it after the death of the witness, when no cross-examination could be had, was irregular.

Mr. *Selwyn* and Mr. *Shapter*, *contrà*. The want of cross-examination may detract from the value of the evidence, and be the subject of observation, but it does not make the act of filing irregular. All parties are at liberty to abstain from filing their affidavits until the last day; *Thompson v. Partridge* (a); and the Lord Chancellor, in *Morley v. Morley* (b), considered, that the delay in filing an affidavit did not prevent its being used, though the witness had died in the interval.

Mr. *Greene*, for other parties.

Mr. *Lloyd*, in reply.

*The*

(a) 4 *De G., M. & G.* 794.

(b) 5 *Ibid.* 613, 614.



1857.

*The MASTER of the ROLLS.*

ABADOM  
v.  
ABADOM.

There is no excuse for not filing the affidavit, it ought to have been filed before, but I am clear that I cannot take it off the file. When the matter comes before me, I shall, to say the least of it, certainly pay much less attention to it than to the other evidence.

I must refuse the motion without costs.

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NOTE.—See *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158.

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## PRIESTMAN v. TINDALL.

June 10.

By the decree, the estates of two deceased trustees were declared severally liable to replace a fund. The representatives of one only admitted assets, and the decree directed payment by them, and an account of the estate of the other. The whole being paid by the former, held, that their right to contribution against the estate of the latter constituted a mere simple contract debt, although as against both estates, the demand was a specialty debt.

BY the decree made in 1856, it was declared, that the estates of *Henry Shield* and *Jane Shield* (the deceased trustees of an indenture of 1813) “were severally liable” to make good 1,666*l.* £3 per Cents. and the dividends; and the legal personal representatives of *Henry Shield*, admitting assets, were ordered to pay that amount into Court, and accounts were directed of the estate of *Jane Shield* for the purpose of contribution.

The whole amount was accordingly paid into Court by the representatives of *Henry Shield*, and the accounts were taken of the estate of *Jane Shield*.

As between the trustees and the *cestuis que trust* the debt constituted a specialty debt. The cause now coming on for further consideration,

Mr. *R. Palmer* and Mr. *C. Hall*, for the representatives of *Henry Shield*, contended, that the amount due from

from the estate of *Jane* to the estate of *Henry*, for contribution, also constituted a specialty debt. They argued, that the rights and liabilities of all parties were here to be settled in one suit and under one decree, and that the Court would so enforce the decree as to make each party bear his proper proportion of the burthen; and that, on further directions, it would treat the liability of each estate on the same principle as if each had done that which was right, and paid its proportion. That the claim against the estate of *Jane* must be treated as being still a specialty debt in favour of the estate of *Henry*.

1857.

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PRIESTMAN  
v.  
TINDALL.

Mr. *Hobhouse*, for the representatives of *Jane*, referred to *Warwick v. Richardson* (a).

Mr. *R. Palmer*. In that case there was a release by the co-surety, who was not a party to the suit.

Mr. *Follett* and Mr. *Howe*, for the Plaintiffs.

*The MASTER of the ROLLS.*

I am of opinion that this is a mere simple contract debt, and I will make a declaration, that as against the estate of *Jane*, the representatives of *Henry* are entitled to stand as simple contract creditors only.

(a) 14 Sim. 281.

1857.

*In re* MAXWELL'S WILL.

June 11.

A testator gave a fund to *A.* for life, and afterwards to his surviving children, but if he died without any, he gave one-half of it "to be disposed of as *A.* should think proper." The son never married. Held, that he took an absolute interest in the one half, and not a life interest, with a power of appointment.

THE testator, by his will, bequeathed as follows :—  
 " I give and bequeath to my eldest son *James Maxwell*, Rector of *Thorpe*, in *Norfolk*, the interest or dividends arising from the sum of 10,000*l.* Reduced £3 per Cent. Annuities, payable at the Bank of *England*, during his natural life, and in case of his death, leaving any lawful issue, my executors are to divide the said sum of 10,000*l.* Reduced £3 per Cent. Annuities amongst his surviving children, paying an equal proportion to each, as he or she attain the age of twenty-one years respectively; but if he should die without lawful issue, I give and bequeath a moiety of the said capital stock *to be disposed of as my said son shall think proper*, and the other half I give and bequeath to such of my grandchildren as may then be living."

By the residuary clause, the testator gave to his son, *George B. Maxwell*, his dwelling-house in *Harley Street*, "with all the household furniture, plate, linen, china, books, horses and carriages, together with all his other property whatsoever and wheresoever, both personal and real, including money in the public funds, *East India Stock*, and all other sums of money belonging to him at the time of his decease."

The testator died in 1830, and the legatee *James Maxwell* died in 1857, a bachelor and intestate, and without having made any disposition of the moiety of the fund. After his death, such moiety was paid into Court, and it was now claimed on the one hand by the Petitioners, his legal personal representatives, and by the legal

legal personal representatives of the residuary legatee on the other.

1857.

*In re*  
MAXWELL'S  
Will.

Mr. *R. Palmer* and Mr. *Druce*, in support of the petition. The son took an absolute interest in the property, which on his death passed to his legal personal representative. Under a devise "*to the discretion of his father*," "*Gawdy* was of opinion, that, upon these words, the father had a fee simple, as I will that my lands shall be at the *disposition* of *J. S.*; by these words *J. S.* hath a fee simple;" *Whiskon* and *Cleyton's Case* (a). In *Hoy v. Master* (b), a testator declared, that property should be "at the sole and entire disposal" of his widow; it was held that it passed by her will. So in *Nowlan v. Walsh* (c), the Vice-Chancellor *Knight Bruce* held, "there was nothing in the word '*disposal*' essentially indicating power rather than property, independently of the context." They also cited *Goodtitle d. Pearson v. Otway* (d); *Sugden on Powers* (e); *Reith v. Seymour* (f).

Mr. *Lewin*, for the trustees.

Mr. *Selwyn* and Mr. *Haynes*, *contrà*. In this case, the son took for life, with power to appoint the half. There are three classes; first, where there is simply an authority to dispose; secondly, where there is a gift for life, with power to dispose; and, thirdly, where there is a life estate with a power to dispose, with an interest interposed between them in favour of another person. The present falls within the third class, with this addition, that there is a gift over in default, by means of the residuary

(a) 1 *Leonard*, 156.

(b) 6 *Sim.* 568.

(c) 4 *De Gez & Sm.* 584.

(d) 2 *G. Wilson*, 6.

(e) Vol. 1. ch. iii. ss. 6, 7, 8.

(f) 4 *Russ.* 263.

1857.  
  
*In re*  
 MAXWELL'S  
 Will.

residuary gift. In *Bradley v. Westcott (a)*, Sir *William Grant* observed, "The distinction is perhaps slight which exists between a gift for life with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established, that in the latter case the property vests. A gift to *A.*, and to such person as he shall appoint, is absolute property in *A.*, without an appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to anything."

In an anonymous case in *Leonard (b)*, the lands were devised "to the wife for life, and after her decease, she to give the same to whom she will." It was determined that she took for life only, but with an authority to give the reversion to whom she pleased, for that the express estate for life should not be enlarged by implication.

In *Tomlinson v. Dighton (c)*, the testator devised certain premises to his wife *Margaret* for her life, and then to be at her disposal, provided it be to any of his children, if living, if not, to any of his kindred that his wife should please; it was held to give an estate for life, with a power to dispose of the fee.

In *Bradly v. Westcott (a)*, the gift of personal estate was to the testator's wife for her life, to be at her free disposal during her life, and after her decease unto and to the use of such person or persons, and in such parts, shares and proportions, as she by her will duly executed

(a) 13 *Ves.* 453.

(b) 3 *Leonard*, 71, pl. 108.

(c) 1 *Peere Wms.*, 149.

cuted should direct or appoint, and for want of such direction or appointment he directed the same to fall into his personal estate: a power only was held to pass.

1857.

*In re*  
MAXWELL'S  
Will.

In *Archibald v. Wright* (a), a "testator directed that after his wife's death, part of his stock should be transferred to *Johanna G.* for her sole and entire use during her life, that she should not alienate it, but enjoy the interest during her life, and that at her decease she might dispose of it as she thought fit. It was held, that *J. G.* took an interest for life, with a power to dispose of the stock by her will." The same doctrine is stated in *Sugden on Powers* (b); and Mr. *Chance*, in his *Treatise on Powers* (c), thus states the law:—"In all the cases which we have hitherto considered, there has been no express life interest limited; the limitation of such an interest must naturally have a considerable effect in the construction of informal dispositions. Thus, though a gift of an estate to a party "at his disposal," or "at his discretion," may pass a fee, if the property be limited to him for life, and afterwards to be "at his disposal" or "at his discretion," the natural inference seems to be, that a power only over the reversion is intended to be conferred, and this whether the ultimate interest be intended for the absolute benefit of the devisee, or for the benefit of particular objects.

#### *The MASTER of the ROLLS.*

This is an absolute gift to the son. It is proper to consider the latter words by themselves, without reference to anything that precedes them. Then I have these words simply:—"I give half of the fund to be disposed of as my son shall think proper;" what is their natural

(a) 9 *Sim.* 161.

(b) Vol. 1, pp. 121—123.

(c) Vol. 1, p. 45, s. 121.

1857.

*In re*  
MAXWELL'S  
Will.

natural meaning? It could not be reasonably argued that they are anything else than an absolute gift of the property. A direction that the fund should "be disposed of as his son should think proper," would simply be a gift to him, his executors, administrators and assigns.

Then what is their meaning coupled with the preceding words: do they import the gift of a power or of an interest? Having stated my opinion as to the latter words as they stand, I think that they must have their natural import and meaning, unless they are controlled by some other parts of the will.

Where, after a life interest, there is a direction that the property shall go in a particular way, in words which clearly import a power, those words create a power and not an interest. Thus, if the testator had given 10,000*l.* to his son for life, and had declared that, subject thereto, he should have power to appoint one-half, or that it should go to such person as he should direct by will, that clearly would be a power: the words are unequivocal, it is a power and not an interest. The distinction is a very fine one between a life interest with such power and an absolute interest; but the consequences may be widely different. If property be given to *A.* for life, with power to dispose of it by deed or will, unless the power is exercised, it does not pass to *A.* or those persons who take from him by descent, &c., as it would if it had been vested in him absolutely. The question here is, whether the words of the will import the execution of a power: and such, in my opinion, is not the case here.

If there had been a gift over, I should hold it to be a power, because this would clearly import that a disposition

position of the property should be made, and in default that it should go over. It was attempted to be argued, that there was a gift over of this property, by means of the residuary bequest; but that is simply begging the question, which is, whether it is absolutely disposed of or not; because the residuary gift does not refer to this in terms, but is of a house and certain specified property, "with all his *other* property." I am, therefore, of opinion, that those cases in which the fund was given over do not apply to this case.

1857.

*In re*  
MAXWELL'S  
Will.

The other cases are those where a life estate is limited, in the first instance, for the specific purpose of introducing a power, particularly in the case of married women; and I concur in the distinction taken in those cases where the donee is a married woman or a person under disability, which the donor cannot remove, and the other cases, where the person is either under no disability at all, or such as the donor can remove. Here the gift is—[*His Honor read it.*—Can it be fairly said, that the life estate is introduced to enable this person to dispose of the property, which he would otherwise be unable to do?

There is a class of cases which is excluded, those where the power of disposing of the reversion is given in addition to life estate, where those interests are severed for the purpose of introducing other estates which are distinct and separate. If the case were here of a gift to the son, and after his death to such person as he should dispose of, it might be said that this would be power and not interest. I express no opinion on that; but where the gift is to the son for life and after his death to his children, and in default of children he should be at liberty to dispose of it as he should think fit, there is reason for giving the life estate for the purpose



1857.

*In re*  
MAXWELL'S  
Will.

pose of introducing the subsequent gift to the children, and unless the words clearly import a power, it is in my opinion an absolute interest in the son, which he may dispose of as he pleases.

I cannot read the words as Mr. *Selwyn* has proposed, as being a gift "to such person as the son should direct." The words are,—“to be disposed of as my son shall think proper;” which, by themselves, import that he may do as he pleases with it. I think the words give the eldest son an absolute interest in the moiety on the failure of the previous interests intended for his children.

### STEPHENSON v. MACKAY.

June 23.

An order was made to dismiss, in default of the Plaintiff filing a replication within fourteen days, but nothing was said as to the costs of suit. The Plaintiff filed a replication a few days after the time appointed. On a subsequent application, the Court dismissed the bill, and with costs.

ON the 28th of *May*, 1857, upon a motion to dismiss, it was ordered, that the Plaintiff should pay the costs of the application, and that the Plaintiff should file a replication, or give notice of motion for a decree in the cause, within two weeks from the date thereof; “and in default thereof, it was ordered, that the Plaintiff’s bill should stand dismissed.” It will be observed, that nothing was said in regard to the costs of suit.

The replication was not filed until the 16th of *June*.

Mr. *Follett* and Mr. *Humphry* now moved, that it might be referred to the Taxing Master to tax the Defendant’s costs of this suit, including the costs of this application, and that the Plaintiff’s bill “might stand absolutely dismissed” out of Court, as against all the Defendants, for want of prosecution, with costs. They argued, that the Defendant having been ordered to do an act, and in default that the bill should stand dismissed, and having failed to comply, the bill stood dismissed, and that if the Plaintiff had any case for indulgence,

other annuitants, and the payment to the issue of each of his daughters, upon further trust, that should stand possessed of the whole real estate, personal estate and premises as *Joseph* and *Henry William*, in their respective executors, adminis-

1857.

~  
BROWN  
v.  
OAKSHOTT.

advise for cesser of the term on the annuitants, and payment of all arrears of the gross sums to be raised.

in 1840.

carried on the business on their own stock and plant, and they employed partnership purposes.

died in *October*, 1844, and *Joseph*, on the 20th of *June*, 1845; after which the business.

question was, whether the two brothers held the real estates during the term as joint tenants in common.

and Mr. *Rogers*, for the Plaintiffs, submitted that the brothers took as tenants in common; and, secondly, that the brothers devoting the real estate to partnership was to create a tenancy in common; *Jackson v. Jack-*

Mr.

(b) 7 Ves. 535, and 9 Ves. 591.

1857.

## BROWN v. OAKSHOT.

June 29, 30.

A testator devised real estates to trustees for 500 years, in trust to pay life annuities, and the residue of the rents to his two sons, "in equal shares;" and, subject thereto, he devised them to his two sons in fee as joint tenants. Held, that during the term, they were tenants in common, and secondly, that the employment by the two sons of the estates in their partnership trade had not the effect of making them tenants in common of the fee.

THE testator *Joseph Brown*, by his will, gave powers to his trustees to enable his two sons to carry on his business of brewer, &c., with his plant, &c.; and he devised and bequeathed his freehold, copyhold and leasehold messuages and hereditaments to his two trustees, *Joseph Cabe* and *John Oakshot*, for the term of 500 years, upon the trusts after expressed; "and from and after the expiration, or other sooner determination of the said term," he devised and bequeathed the same freehold, &c. "unto his two sons, *Joseph* and *Henry William*, their heirs, executors, administrators and assigns, for ever, according to the different natures, tenures and qualities thereof, *as joint tenants*." And as to the term of 500 years, he declared the same to be limited to his trustees, on the trusts after mentioned. He bequeathed the residuary personal estate to the same trustees, upon trust to get in and invest, and upon trust out of the income thereof, and the rents of the messuages, &c., comprised in the term of 500 years, to pay certain life annuities to his wife, daughters and other annuitants, and the sum of 1,000*l.* to the issue of each of his daughters after their deaths. And upon further trust, after payment of the said several annual sums unto his wife, son and daughters respectively, and to the several annuitants, for the time being, for their respective lives, to pay and apply the residue and remainder of the annual rents and profits, interest and dividends of his trust, real and personal estates, unto his said sons *Joseph* and *Henry William*, in equal shares and proportions. And from and after the several deceases of his wife, sons and daughters,

daughters, and the other annuitants, and the payment of the sum of 1,000*l.* to the issue of each of his daughters so dying leaving issue," upon further trust, that they, his trustees, should stand possessed of the whole of his trust monies, personal estate and premises in trust for his "sons *Joseph* and *Henry William*, in equal proportions, their respective executors, administrators or assigns."

1857.

~  
BROWN  
v.  
OAKSHOTT.

There was a proviso for cesser of the term on the death of the annuitants, and payment of all arrears of the annuities and the gross sums to be raised.

The testator died in 1840.

The two sons carried on the business on their own account, with the stock and plant, and they employed the real estate in partnership purposes.

*Henry William* died in *October*, 1844, and *Joseph*, the younger, on the 20th of *June*, 1845; after which the trustees carried on the business.

One of the questions was, whether the two brothers were entitled to the real estates during the term as joint tenants or tenants in common.


Mr. *R. Palmer* and Mr. *Rogers*, for the Plaintiffs, argued that the two brothers took as tenants in common so long as the term subsisted; and, secondly, that the effect of the two brothers devoting the real estate to Partnership purposes was to create a tenancy in common; *Collyer* on Partnership (a); *Jackson v. Jackson* (b).

Mr.

(a) Page 80.

VOL. XXIV.

(b) 7 *Ves.* 535, and 9 *Ves.* 591.

1857.      Mr. *W. R. E. Forster*, for the widow of the second  
  
 BROWN  
 v.  
 OAKSHOTT.      Mr. *Roberts* in the same interest.

Mr. *Lloyd*, Mr. *Briggs*, Mr. *Toller* and Mr. *Godfrey* argued, that the brothers were joint tenants during the term, for it would be inconsistent to be seised of the fee as joint tenants, and be entitled to the surplus rents, during the term, as tenants in common. That words importing a tenancy in common might be neutralized by an opposing context: 2 *Jarman* on Wills (a); *Armstrong v. Eldridge* (b); *Pearce v. Edmeades* (c); and that the object of the testator in creating the term was merely to secure the annuities, and not to alter the tenure of the sons of the real estate. They also cited *Lake v. Craddock* (d).

June 30.      *The MASTER of the ROLLS.*

The first question is upon the construction of the will. The testator gives his freeholds, copyholds and leaseholds to trustees for 500 years, and from and after the expiration or sooner determination of the term, he gives them to his two sons, expressly as joint tenants. It is to be observed, that there is no immediate gift to the sons of the inheritance of the estate; but it is a gift of it to them "from and after the expiration or other sooner determination of the term." Therefore the trusts of the term are to be first satisfied; the trustees of the term are to pay the annuities and legacies, and until this is done, they are to pay the residue of the rents to the sons "in equal shares and proportions."

It

(a) Page 213 (2nd edit.)  
 (b) 3 Bro. C. C. 215.

(c) 3 Y. & Col. (Exch.) 246.  
 (d) 3 P. Wms. 157.

It is admitted, that in an ordinary case, these words, by themselves, would create a tenancy in common ; but it is argued, that they may be controlled by other expressions in the will, which may give to them the effect of a joint tenancy. I am, however, of opinion, that it is impossible for me to control the effect of these words by anything to be found in this will. They import a tenancy in common, that is their legal effect, taken by themselves ; I find no words in juxtaposition which affect or alter the construction ; but I find this : that after the determination of the term, he has given the absolute interest to the sons as joint tenants. From thence it is argued, that the latter gift has the effect of controlling the previous words, for that it is perfectly inconsistent to make the sons tenants in common during the term of the surplus rents, but joint tenants of the reversion subject to the term.

1857.  
BROWN  
v.  
OAKSHOTT.

I am, however, unable to see that inconsistency : the testator may have had very good reasons for what he has done ; but it is unnecessary to speculate on this, because the words of the will are precise and distinct, and I could not control the distinct and clear words of the will simply because I thought that the testator might have made a more prudent arrangement, or one less open to the imputation of inconsistency. If I found words so ambiguous that I could not read them as they are used in the will, then I must attach a meaning to them, which I should necessarily have to discover from the various other parts of the will ; but in this case I see no reason for altering the ordinary and obvious meaning of the words used. I am, therefore, of opinion that, during the term, the sons take as tenants in common.

It is, therefore, unnecessary to go into the question, whether the fact of the two brothers having employed

1857.  
BROWN  
v.  
OAKSHOTT.

the whole of these freeholds, copyholds and leaseholds in their partnership trade as brewers, &c., did thereby effect a severance of a joint tenancy. I think it would be difficult to distinguish *Jackson v. Jackson* (a) from the present case, if, according to the true construction of the will, a joint tenancy were created. But being of opinion that that is not the true construction of the will, I consider that this case is distinguishable from *Jackson v. Jackson* (a), and that there is no severance of the joint tenancy of the reversion, subject to this term of 500 years, by reason of these messuages having been, during the continuance of the term, employed by the two brothers in their trade of brewers and maltsters.

Consequently *Joseph* the younger, upon the decease of his brother *Henry*, took the fee simple in the freeholds and copyholds, and the absolute interest in the leaseholds, subject to the term.

(a) 7 *Ves.* 535, and 9 *Ves.* 591.

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1857.

## SHEAF v. CAVE.

June 30.

July 6.

THE testator died in 1840, having devised his real estates to trustees for 500 years, on trust to pay some life annuities and a gross sum of 1,000*l.*, and pay the residue of the rents, during the term, to his two sons *as tenants in common*; and "after the expiration or other sooner determination of the term," he devised the estates to his two sons and their heirs *as joint tenants*(a). A husband was seised in fee, subject to a trust term to secure life annuities and to pay him half the surplus rents. Held, that his widow was entitled to have her dower set out at once.

Both sons survived the testator; *Henry* died in 1844, and *Joseph* in 1845.

The widow of *Joseph* (now *Mrs. Sheaf*) by this suit claimed dower out of the real estate. She had married *Joseph Brown* in 1827.

By the decree (26th *July*, 1851) it was referred to the Master to inquire what real estate *Joseph Brown* was seised of or entitled to, of which the Plaintiff was dowerable.

The Master found, that *Joseph Brown* was, during his marriage to the Plaintiff and at his death, seised in fee of the property devised by his father's will, subject to an outstanding term of 1,000 years, said to be satisfied, and subject to the trusts of the term of 500 years created by the will for securing certain annuities, some of which were still subsisting, and for raising a sum of 1,000*l.* in gross. And he found that the Plaintiff "became,

(a) See *Brown v. Oakshott*, *ante*, 254.



1857.

*SHEAF*  
v.  
CAVE.

"became upon his death, and was now, entitled to dower out of the real estates, subject to the question, how far the satisfied term of 1,000 years would prevent her right to dower, during the existence of the trusts for which the same were created; and also subject to the question, how far the term of 500 years would prevent her right to dower, during the existence of the trusts for which the same was created."

The cause now came on for further directions.

Mr. *R. Palmer* and Mr. *Smythe* for the Plaintiff. The Plaintiff Mrs. *Sheaf* has a right to dower, and to have it at once set out; her first husband had a present freehold of inheritance subject to the term. The satisfied term of 1,000 years will be put out of the way, and as to the term of 500 years, she is entitled to her one-third of the rents, after payment of the annuities and of the interest on the prior charges.

The point is thus stated in *Roper* on Husband and Wife (a):—"If the husband be seised for life, remainder to A. for a term of years, remainder to himself in fee or in tail; or if, at the time of the marriage, the estate be subject to any other chattel interests, his widow will be entitled to dower subject to those interests. An instance of the first case has been already adverted to. Also, at law, if the husband, previously to his marriage, demise his lands for a term of years without a rent, his widow will be entitled to endowment of the reversion, with a stay of execution during the term; and if he reserve a rent upon the lease, his widow will be entitled to dower of a third part of it as incident to the reversion. So also, if the husband's estate be subject to a mortgage for a term

(a) Vol. 1, p. 371 (2nd edit.)

term of years at and during the marriage, the widow's right of dower will attach to the reversion upon the expiration of the term, and not sooner. At law there is no difference whether the mortgage be satisfied or not, if the term be subsisting, but in equity, if the mortgage be paid off and the term therefore satisfied, the widow will be entitled, as against her husband's *heir* or *devisee*, to a removal of the legal impediment of the outstanding term, and to be immediately endowed. But if the mortgage be a subsisting charge at the husband's death, then, although the widow will be entitled to immediate endowment of the reversion, yet it is upon the terms of keeping down a third part of the interest."

1857.

*SHEAF  
v.  
CAVE.*

Mr. Lloyd and Mr. Toller *contra*. The widow is not entitled to come into equity until she has a right to have her dower set out by metes and bounds. The trusts of the term are active trusts, and the interest of her husband in it was equitable; so that, being married before the Dower Act, she has no right to dower until the term has ceased. A widow is entitled to have a satisfied term put out of the way, because she is interested in the reversion in fee, and the term attends the inheritance, but here the term of 500 years is not yet satisfied. It would be useless to assign dower by metes and bounds at present, for the Plaintiff may never be entitled to any; she may not survive the term and become entitled to dower. She has no present right, and her bill ought therefore to be dismissed with costs, without prejudice to any other suit she may institute when entitled in possession.

Mr. Rogers in the same interest. At law, the Plaintiff would obtain judgment with a *cessat executio* during the term, and she could not have her dower set out while there was a stay of execution.

Mr.

1857.

SHEAF

v.

CAVE.

Mr. *J. H. Taylor* and Mr. *Briggs* for other parties.

Mr. *R. Palmer* in reply. The Plaintiff has a right to know what she is entitled to and in what property, for she may then sell her interest or make it otherwise available. She ought to have it set out in the ordinary way, and have the costs of suit.

*The MASTER of the ROLLS.*

I will consider this case.

July 6.

*The MASTER of the ROLLS.*

The question is, whether this lady is entitled to have her dower assigned, there being a subsisting term of 500 years, determinable on the deaths of certain annuitants, whom she may possibly survive.

I think her right to have dower assigned is incident to the fact that she has a present right to dower, though it is true that it cannot be enjoyed during the term.

I think that there is attached to her right to dower a right to have it assigned by metes and bounds. I shall therefore make the ordinary decree, and the costs will follow the usual form (a).

(a) See *Beames on Costs*, § v.

1857.

SCOTT v. SCOTT.

June 29.

July 6.

**T**HE question in this case arose on the construction of a deed of the 27th of October, 1845. Mr. Parker, who was a carrier, had a claim against the Great Western Railway Company, in respect of overcharges made by them. Scott advanced money to Parker to enable him to carry on his business, and in July, 1844, a memorandum of agreement was given by Parker to Scott, whereby it was agreed, that Parker should give to Scott a security, upon the thereinbefore recited debt then due and which might thereafter become due to him from the Great Western Railway Company.

In 1844, A. B. agreed to give to his creditor a security on the debt then due, "or which might thereafter become due to him" from a company. This was carried into effect by a deed in 1845, which, after reciting the agreement, assigned all sums claimed to be due, and which he might thereafter recover. Held, that the deed passed all sums due at its date, but nothing subsequent.

Subsequently, by an indenture of the 27th of October, 1845, and made between Parker of the one part, and Scott of the other part, after reciting that Parker was engaged as a carrier, and that the Great Western Railway Company had exacted from him higher charges than they were entitled to, and that he was about to take legal proceedings to recover the overcharges and damages, and reciting the liabilities of Parker to Scott, and the agreement between Parker and Scott, dated the 27th of July, 1844, whereby it had been agreed that Parker "should give to Scott security upon the hereinbefore recited debt then due and which might hereafter become due to him from the Great Western Railway Company," and that Scott had applied to Parker to give legal effect to the memorandum of agreement, and that in further performance of the said memorandum, Parker had agreed to assign the sums of money and damages "which he might recover in his action or suit against the

1857.

SCOTT  
v.  
SCOTT.

the *Great Western Railway Company*," it was witnessed, that *Parker* assigned to *Scott* "all and every the sum and sums of money claimed by *Parker* to be due and owing from the said company, as hereinbefore mentioned or referred to, and which he *Parker* should or might, at any time thereafter, recover or receive from the company, by reason or means of any action or actions, suit or suits, agreement or agreements for reference, and by reason or means of any other proceeding or process at law or in equity whatsoever," as a security for monies "then already or thereafter to be advanced." And *Parker* covenanted forthwith to commence one or more action or actions against the company to recover the monies so claimed to be due.

The overcharges went on until *Parker* became bankrupt, in *March*, 1847; afterwards an action was brought by his assignees against the company, in *February*, 1848, and they ultimately recovered 3,115*l.*, of which 2,412*l.* 8*s.* was in respect of overcharges prior to the deed of the 27th of *October*, 1845, and the remaining 702*l.* 12*s.* for overcharges subsequent to that period.

The question was, whether the deed carried the residue of 702*l.* 12*s.*, being overcharges subsequent to the deed.

Mr. *R. Palmer* and Mr. *W. H. Clark* for *Scott*, cited *Lyde v. Mynn* (a).

Mr. *Selwyn* and Mr. *Hardy* for the assignees of *Parker*.

The MASTER of the ROLLS reserved judgment.

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(a) 1 *Myl. & K.* 683.

*The MASTER of the ROLLS.*

1857.

SCOTT

v.

SCOTT.

July 6.

I am of opinion the deed does not carry the 702*l.* 12*s.* The operative words clearly do not include it, because they only extend to all money then claimed by *Parker* to be due and owing from the company, and do not, therefore, include sums which might thereafter be claimed to become due. It includes everything due at the time, and which (*i. e.* which said sums) "he may at any time hereafter recover." It is proposed to introduce some words, such as "and all sums of money which may hereafter become due;" but it would be a most extraordinary thing, to introduce words into the operative part of the deed so as to make it include additional subject matter, unless it were clearly shewn that they had been omitted by mistake. Evidence of mistake there is none, unless it is to be gathered from the instrument itself. It might, however, be shewn by the context that this was intended. I will, therefore, go through the recitals, to see if they control the operative part.—[His Honor examined them *seriatim*, and concluded :]—

I think that these recitals are carried into effect by the operative part of the deed. The recitals of the agreement speak of the overcharges as a "debt due, and which might thereafter become due;" and another recital states that *Scott* had called on *Parker* to give legal effect to that memorandum of agreement. I think it does give effect to it as regards subsequent charges, for it comprises the subsequent overcharges for the fifteen months between *July*, 1844, and *October*, 1855. It is properly asked, "to what time are the overcharges to be limited?" Was it intended to include all the overcharges so long as *Parker* carried on his business, or so long as they went on? Or was not *Scott* entitled to say, "I will have my security perfected?" The proper period

1857.

SCOTT  
v.  
SCOTT.

period to which the overcharges should be limited seems to me to be at the time when *Scott* said "give me the security agreed upon."

I think, therefore, that the recitals are consistent with the operative part of the deed, which properly carried into effect the agreement of 1844, and that, therefore, the 702*l.* 12*s.* did not pass by the deed.

## SPENCER v. PEARSON.

## PEARSON v. SPENCER.

July 13.

The owner mortgaged first to *A.*, secondly to *B.*, and he then conveyed to *C.* "in trust" to sell and pay *A.* and a debt due to *D.*, and another due to *C.*, and the residue to the owner. *C.*, who had no notice of *B.*'s mortgage, afterwards got a transfer of *A.*'s mortgage, and with it the legal estate. Held, that *C.* was entitled to tack the third charge to the first mortgage, and exclude *B.*

IN 1845, *Pearson* conveyed some property to *Jackson* in fee, subject to redemption on payment of 2,250*l.*

In 1848, the same property was conveyed by *Pearson* to *Mossop*, by way of mortgage, to secure 700*l.*

In *March*, 1851, the same property was conveyed by *Pearson* to the Plaintiff *Spencer*, upon trust to sell and pay, 1st, the costs, &c.; 2ndly, the 2,250*l.* and interest due to *Jackson*; 3rdly, a debt of 837*l.* then due from *Pearson* to the *Whitehaven* Bank; 4thly, a debt then due from *Pearson* to *Spencer*, with further advances limited to 1,200*l.*; and 5thly, to pay the residue to the mortgagor.

It will be observed, that *Mossop's* mortgage was not mentioned in the deed, the Plaintiff having, in fact, no notice thereof. The Plaintiff, however, shortly afterwards discovered the existence of *Mossop's* mortgage, and that he had instituted a suit for foreclosure; the Plaintiff thereupon agreed with *Jackson* for a transfer of

of his mortgage. Accordingly, by an indenture of the 13th of *August*, 1851, *Jackson*, in consideration of 2,445*l.*, conveyed the property to the Plaintiff, subject to such rights of redemption as was then subsisting thereon. He also assigned to him the principal money then due.

1857.

SPENCER  
v.  
PEARSON.  
PEARSON  
v.  
SPENCER.


The Plaintiff now claimed priority, in respect of the first and third mortgages, over the second, insisting that he was entitled to tack them.

*Mr. Roberts*, for *Mossop*. The Plaintiff is not entitled to tack the first and third mortgages. The third mortgage was given, not in consideration of an advance of money on the security of the estate, but for an existing debt, *Pearson* being then (as the bill states) in embarrassed circumstances. It was taken, without any investigation or inquiry, for what it was worth; and it is plain, from the early discovery of the second mortgage, that if proper inquiries had been made and due caution used, *Mossop's* mortgage would have been discovered before the transaction had been completed.

The deed of *March*, 1851, is not in the form of a mortgage, but is a conveyance in trust, a mere trust deed. To enable a mortgagor to tack, he must shew that he advanced his money on the security of the land; and, secondly, he must claim the two securities in the same character, and not one in trust and the other beneficially. In *Morret v. Paske* (a), it was held by Lord *Hardwicke*, that "a prior mortgagee, who has an assignment of a third mortgage, as a trustee only, cannot tack the two mortgages together, to the prejudice of intervening incumbrancers." So in *Barnett v. Weston* (b), it was held by Sir *W. Grant*, that "the right of the first

(a) 2 *Atkins*, 52.(b) 12 *Ves.* 130.



1857.  
  
 SPENCER  
 v.  
 PEARSON.  
 PEARSON  
 v.  
 SPENCER.

first mortgagee, with the legal estate, to tack, as against *mesne* mortgagees, does not cover a mortgage of the equity of redemption coming to him as executor." Here the Plaintiff does not, in the first place, take a mortgage security for himself, but a conveyance in trust for others. He holds as a trustee.

Besides this, the form of the deed of *March*, 1851, precludes the doctrine of tacking, which is only applicable where there is an equity of redemption, and not where there is a mere trust for sale. In *Ex parte Pettit*(a), *Houghton* conveyed property to *Pettit* in fee, upon trust to sell and pay himself a debt of 1,200*l.* due to him from *Houghton*, and the surplus to *Houghton*. *Houghton* was also indebted to *Pettit* in 1,016*l.* on judgment. It was held, that in consequence of the form of the security, he could not tack the judgment debt.

The Plaintiff, therefore, is not entitled to tack; the rule of the Court that incumbrancers must be paid according to their priorities in dates must prevail, and *Mossop* stands as second mortgagee.

Mr. *R. Palmer*, Mr. *Osborne*, Mr. *Follett*, Mr. *Selwyn*, Mr. *Jolliffe*, and Mr. *Bagshawe*, Junior, were not heard.

*The MASTER of the ROLLS.*

I think that this is an ordinary case of tacking. It is clear that the Plaintiff has advanced his money on a security without notice of a prior one, and he afterwards gets in the first and the legal estate. Mr. *Mossop* might have done the same if he had thought fit, but he has not done so.

(a) 2 *Glyn & J.* 47.

1857.

## COLLINSON v. COLLINSON.

July 7.

**B**Y a settlement dated in *February*, 1836, the manor of *Hayles*, otherwise *Testerton Halys*, together with the lands, &c., were conveyed to a trustee in fee, in trust for Mr. and Mrs. *Wythe*, successively, for life, and subject thereto and to other estates which failed, upon trust to sell, and stand possessed of the trust moneys for the children and issue of Mr. and Mrs. *Wythe*, as Mr. and Mrs. *Wythe* should appoint, and in default of appointment for all the children, who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry.

Hereditaments were, by deed of 1836, conveyed to a trustee for sale, the produce to be held as *A.* and *B.* should appoint. Part of the property was taken by a railway company, and the purchase money was laid out in the purchase of cottages, which, in 1850, were conveyed to the trustee. In 1851, by deed poll, reciting that, by the settlement, the property (describing it) had been conveyed to the uses above mentioned, *A.* and *B.* appointed all the monies to arise from the sale of the aforesaid hereditaments, and the said hereditaments until such sale. Held, that the cottages were not included in the appointment.

In the year 1849, a small portion of the *Testerton Estate* had been taken by and conveyed to the *Norfolk Railway Company*, pursuant to the provisions of the Acts of Parliament passed for the establishing of the company. The sum of 190*l.*, which was paid for the purchase thereof, and the further sum of 110*l.*, paid by the company as compensation for damage caused by the severance of the estate, making together the sum of 300*l.*, were laid out in the purchase of six several messuages or cottages, with their appurtenances, situate in *Providence Row, Fair Green, Middleton*, being copyhold of the manor of *Middleton*, in the county of *Norfolk*, which were, pursuant to an indenture, dated the 21st day of *June*, 1850, duly conveyed to the trustee, upon the trusts of the settlement of 1836.

By deed poll, dated the 10th of *March*, 1851, under the hands and seals of Mr. and Mrs. *Wythe*, after reciting the settlement

1857.  
COLLINSON  
v.  
COLLINSON.

settlement of 1856, whereby "all that the manor of *Hayles*," &c. [describing the property], had been conveyed to the uses above stated, Mr. and Mrs. *Wythe*, in exercise of their power, appointed that "all and singular the moneys to arise by the sale of the aforesaid manor, lands, and other hereditaments, pursuant to the trust in that behalf in the same indenture contained, and the stocks, fund and securities in or upon which the same might, from time to time, be invested, and the interest, dividends and annual produce to arise and be produced from such trust moneys, and the said manor, lands and hereditaments, until such sale thereof, as last aforesaid, and the rents, issues and profits of the same manor, lands and hereditaments, should remain and be in trust" as to half for Mrs. *Case* and her issue, and as to the other half for the Plaintiff and her issue.

Mr. *Wythe* died in 1852, and Mrs. *Wythe* in 1855.

The question was, whether the six cottages were duly appointed by the deed of 1851.

Mr. *R. Palmer* and Mr. *Dickinson*, for the Plaintiff.

Mr. *Bush*, for the husband and children of the Plaintiff, argued that the cottages passed by the appointment, for by the Lands Clauses Consolidation Act, the 8 & 9 *Vict.* c. 18, s. 69, the money paid by the railway company was to be laid out in the purchase of other lands, to be settled "upon the like uses, trusts and purposes, and in the same manner as the lands, in respect of which such money should have been paid, stood settled," and that they had therefore become included in the settlement.

Mr. *Baggallay*, for Mr. and Mrs. *Case*.

Mr.

Mr. Young, *contra*, argued, that the words of the deed were insufficient to pass the cottages.

1857.

COLLINSON  
v.  
COLLINSON.

*The MASTER of the ROLLS.*

I do not think that the deed operated as an appointment of the cottages. The words are too strong.

FOX v. YATES.

**T**HIS bill prayed that a mortgage deed of the 20th of September, 1854, might be set aside, and that bills and promissory notes, accepted and signed by the Plaintiff, might be delivered up by the Defendant.

July 14.

A single plea of three outlawries allowed.

To this bill the Defendant put in a plea, which was as follows:—That the Plaintiff now is and standeth a person outlawed, and is thereby disabled, by the laws of the realm, to sue or commence any action or actions, suit or suits, in this Honorable Court, or in any other Court, until the said outlawries be reversed by due course of law. For this Defendant saith, that on the 23rd day of May, which was in the thirteenth year of the reign of her present Majesty, the said Plaintiff, by the description of *Sackville George Lane Fox*, was outlawed in an action on promise, at the suit of *Henry Dyle* (as by the said outlawry *sub pede sigilli* hereunto annexed appeareth), which said outlawry doth yet stand and remain in full force and unreversed. And further, that on the same 23rd day of May, in the thirteenth year of the reign of her present Majesty, the said Plaintiff, by the description of *Sackville George Lane Fox*, was outlawed in an action on

1857.

  
 Fox  
 v.  
 Yates.

promises, at the suit of *Laurence Isaac Nathan* (as by the said outlawry *sub pede sigilli* hereunto annexed appeareth), which said outlawry doth yet stand and remain in full force and unreversed. And further, that on the 12th day of *September*, in the fourteenth year of the reign of her present Majesty, the said Plaintiff, by the description of *Sackville George Lane Fox*, late of *Hounslow*, in the county of *Middlesex*, Lieutenant in her Majesty's 2nd regiment of Horse Guards, was outlawed in an action on promises, at the suit of *George Jones* (as by the said outlawry *sub pede sigilli* hereunto annexed appeareth), which said outlawry doth yet stand and remain in full force and unreversed."

"And this Defendant doth aver, that *Sackville George Lane Fox*, the complainant named in the bill of complaint, and the said *Sackville George Lane Fox*, named in the certified copies of the first and third of the said outlawries *sub pede sigilli* thereunto annexed, and the said *Sackville George Lane Fox* named in the certified copy of the second of the said outlawries *sub pede sigilli* hereunto annexed, is one and the same person, and not divers and several. And therefore this Defendant doth humbly demand the judgment of this Honorable Court, whether or not he shall be compelled to make any further or other answer to the said Plaintiff's bill of complaint, until the complainant shall have reversed each and every of the said outlawries, and thereby become a person of ability and capable to exhibit a bill of complaint against this Defendant; and, in the mean time, this Defendant prays to be hence dismissed, with his reasonable cost in this behalf most wrongfully sustained."

"Pleas before our Lady the Queen," &c., &c.

Mr.

Mr. *Selwyn* and Mr. *Elderton*, in support of the plea cited *Waters v. Mayhew* (a).

1857.

Fox  
v.  
YATES.

Mr. *R. Palmer*. The plea is informal on the ground of duplicity. It tenders more than one issue, and is in substance, three pleas of three distinct outlawries, at the suit of *Dyle, Nathan* and *Jones*. It might be good as to one and void as to the others. A "Defendant cannot plead two outlawries or two excommunications in abatement, duplicity being a fault in abatement as well as in bar;" 1 *Bacon's Abr.* (b), citing *Trevelian v. Seccomb* (c).

Secondly, the entry of the judgment of outlawry in the action ought to have been set out; *Waters v. Mayhew* (a); *Attorney-General v. Richards* (d).

Mr. *Selwyn*, in reply. This is a plea of one fact, namely, that the Plaintiff is an outlaw, and that fact is evidenced by three judgments of outlawry. *Waters v. Mayhew* (a) was a case of two outlawries, one at the suit of *Hill*, and the other at the suit of *Cooper*. If the three outlawries were not stated, the Plaintiff might be able to reverse one, by arrangement, and go on with this suit, though still an outlaw.

Secondly, *Attorney-General v. Richards* (d) does not apply. The outlawry must appear on the judgment roll; it is entered on the judgment roll, which is set forth in the plea.

The

(a) 1 *Sim. & St.* 220.

(b) Page 29, *Abatem.* P.

(c) *Carth.* 8.

(d) 8 *Beav.* 380.

1857.

*The MASTER of the ROLLS.*

  
 Fox  
 v.  
 YATES.

If necessary, I should certainly give the Defendant leave to amend and plead the several matters, so as to get over the objection, which is merely a technical one. I refer to what Lord *Redesdale* says:—"If two matters of defence may be thus offered, the same reason will justify the making any number of defences in the same way, by which the ends intended by a plea would not be obtained; and the Court would be compelled to give instant judgment on a variety of defences, with all their circumstances, as alleged by the plea, before they are made out in proof, and consequently would decide upon a complicated case, which might not exist. This reasoning, perhaps, does not in its extent apply with equal force to the case of two several bars pleaded as several pleas, though to the same matter, and it may be said that such pleading is admitted at law, and ought to be equally so in equity" (a).

These are certainly three pleas of the same nature, all tending to shew that the Plaintiff is an outlaw, and if any one is good, the Defendant ought to be at liberty to plead it. I express no opinion on the subject, but, if necessary, I would give leave to amend or to plead the three several matters.

July 15.

*The MASTER of the ROLLS* allowed the plea.(a) *Mitford on Pleading*, p. 952 (4th ed.)

1857.

## SKIRVING v. WILLIAMS.

**WILLIAM SKIRVING**, by his will dated the 12th day of *January*, 1855, directed payment of his just debts, he appointed two executors, and after bequeathing certain legacies, he gave, devised and bequeathed all the rest, *residue* and remainder of his real and personal estate, which he should be seised or possessed of or entitled to, in possession, reversion, remainder or expectancy, at the time of his decease, unto and to the use of his executors, their heirs, executors, administrators and assigns, according to the nature and quality thereof, upon trust, in the first place, by and out of the rents, issues and profits, dividends, interest and annual profits thereof, or by the sale or mortgage thereof, to levy and raise, from time to time, such sum or sums of money as should be sufficient to make good to or for the Plaintiff, his wife, so much of an annuity of 500*l.* provided for her by his marriage settlement as the funds thereby provided for that purpose should not be able to satisfy, and to apply the same accordingly, and subject thereto, the trustees were to be seised and possessed of or entitled to his trust estate, if he should leave him surviving any children or child by his wife, then upon trust for such children or child as therein mentioned, and if he should not leave any child him surviving by his wife (which event happened), then upon trust to pay the rents, issues and profits, dividends, interest and income of his said real and personal estate unto his said wife for her life, if she should so long continue unmarried and should not have become a Roman Catholic; and from and after the decease of his said wife, or her marriage

July 27.

Tenant for life of a residue, held, upon the terms of the will, entitled to enjoy long annuities *in specie*.

By partnership articles, the testator's capital was to remain in the concern for eighteen months after his death. The tenant for life of the residue was held, upon the terms of the will, entitled to the profits made during that period.



1857.  
SKIRVING  
v.  
WILLIAMS.

marriage or becoming a Roman Catholic, which should first happen, then upon trust, by and out of his said real and personal estate, or the produce thereof, to pay certain legacies, and subject thereto, upon trust to convey, assign, transfer and pay the residue of his said real and personal estate unto the Defendant *David M'Laren*, his heirs, executors, administrators and assigns, according to the nature and quality thereof.

And it was provided, that if *David M'Laren* should at any time become bankrupt, or should take the benefit of any Act for the relief of insolvent debtors, or should do any act whereby the said residue of the testator's real and personal estate should become distributable amongst his creditors, then he directed that his estate and interest therein should thereupon cease, and from thenceforth the rents, issues and profits, dividends, interest and income of his, the testator's real and personal estate should, from time to time, during the life of the said *David M'Laren*, be paid and applied to the child or children of the said *David M'Laren*, and if there should be any such, the issue of his child or children who should be then dead, to be divided between them, if more than one, as tenants in common, but so and in such manner that they should take *per stirpes* and not *per capita*, and no person should take under the description of issue whose parent should be alive and take a share in the said rents, issues and profits, dividends, interest and income, under that description; and from and immediately after the death of the said *David M'Laren*, the residue of the testator's said real and personal estate should be held in trust for the child or children of the said *David M'Laren*, and if there should be any such, the issue of any child or children who should be then dead, his, her or their heirs, executors, administrators and assigns,  
according

according to the nature and quality thereof, to be divided between such children and issue respectively, if more than one, as tenants in common, but so and in such manner that they should take *per stirpes* and not *per capita*, and no person should take under the description of issue whose parent should be alive and take a share in his said residuary real and personal estate under that description.

1857.

SKIRVING  
v.  
WILLIAMS.

And the testator thereby directed, that his said trustees should have power, until the death of his said wife, or until she should marry or become Roman Catholic, which should first happen, with the consent in writing of his said wife, and after her death or marriage or becoming Roman Catholic, which should first happen, then and during the continuance of the estate and interest in the residue of his real and personal estate, given to the said *David M'Laren*, with the consent in writing of the said *David M'Laren*, and after the death or marriage or becoming a Roman Catholic, which should first happen, of his said wife, and after the cessor of the said estate and interest of the said *David M'Laren*, or after the death or marriage or becoming a Roman Catholic, which should first happen, of his said wife, and the death of the said *David M'Laren*, and thenceforth for the period of twenty-one years, to sell all such parts of his said real and personal estate as were in their nature saleable, either altogether or in parcels, and should stand possessed of the purchase-money upon the trusts and for the ends, intents and purposes which should be then subsisting concerning the property from which the same money or moneys should have arisen.

And he thereby declared, that the trustees should have power to lay out and invest all or any part of his  
trust

1857.  
SKIRVING  
v.  
WILLIAMS.

trust estate, or the produce thereof, as aforesaid, in or upon any of the Parliamentary Stocks or Funds of *Great Britain*, or at interest upon government or real securities in *England, Wales, Scotland or Ireland*, which securities they or he should have power, from time to time or at any time, to alter, *vary* or transpose into or for others of the same or the like nature, in their or his discretion. And that the same stocks, funds and securities should be held upon the same trusts and for the same ends, intents and purposes as would have been then subsisting concerning the premises from which the same originally should have been derived.

The testator died on the 30th day of *January*, 1856, leaving the Plaintiff his widow, but no child him surviving.

At the time of his decease, besides other personal property, the testator was possessed of certain Long Annuities, which will expire in the year 1860, and also of Bank Stock.

Another question arose under the following additional circumstances :—

At the time of his decease and for several years previously, the testator was a partner in the *Plymouth Distillery*, each partner in which had a certain amount of capital in the business. The articles of partnership, dated the 24th of *June*, 1842, provided, that if any or either of the said partners should die before the expiration of the term of the co-partnership, then and in such case the whole capital and interest of the party so dying should remain and continue in the said trade or business, from the time of his decease until twelve calendar months after the 25th day of *June* or 25th day of *December* next following such decease, whichever should

should first happen, provided the said co-partnership term should so long continue, during which time, as the case might be, the executors or administrators of the party so dying should be entitled to the share or proportion of the gains or profits, and be allowed to draw on account thereof, and should be subject and liable to the losses, charges and expenses of the said trade or business, in all respects as the party so dying would have been entitled or subject or liable to during that period.

1857.


SKIRVING  
v.  
WILLIAMS.

According to this provision in the partnership articles, the testator's capital was to remain in the business until the 25th of *June*, 1857, the original partnership term not expiring before that time, and considerable profits had been made in the business since the testator's death, and would, it was expected, continue to be made therein.

Doubts having been entertained whether the Plaintiff, the widow of the testator, was entitled, as tenant for life under the will, to enjoy the dividends and profits arising from the testator's Long Annuities and Bank Stock, and from the said business respectively, *in specie*, or whether the Long Annuities and Bank Stock ought to be converted into other stocks or securities, and the profits of the business capitalized, it had been agreed to submit such points to the judgment of the Court.

The questions stated for the opinion of the Court were as follows:—1st. Whether the Plaintiff was entitled to enjoy the Long Annuities and Bank Stock, or either and which of them, *in specie*, or whether they ought to be sold and the proceeds invested in Consols.

2nd. Whether the Plaintiff was entitled to enjoy the profits

1857.  
  
 SKIRVING  
 v.  
 WILLIAMS.

profits of the business, as part of the income of the testator's estate to which she was entitled, or whether the same ought to be invested and considered as part of the capital of the testator's estate.

Mr. *R. Palmer* and Mr. *Amphlett*, for the Plaintiff.

They cited *Howe v. Lord Dartmouth* (a); *Alcock v. Slopers* (b); *Pickering v. Pickering* (c); *Daniel v. Warren* (d); *Hunt v. Scott* (e); *Burton v. Mount* (f).

Mr. *Follett* and Mr. *Rowcliffe*, *contra*. The rule laid down in *Howe v. Lord Dartmouth* (a), is, that where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each person, in succession, the dividends of the fund; *Morgan v. Morgan* (g). The question is, whether the power of sale takes this case out of the rule. It is a question of intention, the *onus* lies on the tenant for life of shewing her right to enjoy *in specie*, and the whole of the will must be regarded, in order to ascertain it. The testator directs the payment of his debts, and thereby confers on the executors and trustees a power of selling his real and personal estate. Next, they are to raise, out of the rents, "or by sale or mortgage," sufficient to make up the annuity of 500*l.* to the widow. This, again, authorizes both a sale and a mortgage. After the gift to the wife, the legacies are payable "out of his real and personal estate, or the produce thereof," assuming, therefore, that it had been sold. The intention is, that the "real and personal

|                                                         |                                         |
|---------------------------------------------------------|-----------------------------------------|
| (a) 7 <i>Ves.</i> 137.                                  | (d) 2 <i>You. &amp; C. (C. C.)</i> 290. |
| (b) 2 <i>Myl. &amp; K.</i> 699.                         | (e) 1 <i>De Gex &amp; S.</i> 219.       |
| (c) 2 <i>Beav.</i> 31, and 4 <i>Myl. &amp; Cr.</i> 289. | (f) 2 <i>De Gex &amp; S.</i> 383.       |
|                                                         | (g) 14 <i>Beav.</i> 72.                 |

personal estate" shall be enjoyed by all, and this can only be effected by a conversion. They also cited *Hood v. Clapham* (a).

1857.

SKIRVING  
v.  
WILLIAMS.

The interest in the partnership, though not perishable, must still be converted, on the same principle as railway shares were directed to be converted in *Thornton v. Ellis* (b). The power of sale does not apply to it, for it is not "in its nature saleable," but a value must be placed upon it; *Meyer v. Simonsen* (c).

*The MASTER of the ROLLS*, without hearing the reply :—

I cannot distinguish this case from *Alcock v. Slopers*, and the other cases on which I have before acted.

The question is, not whether the power of sale applies to all the property or not, because I think it justly observable that it could not apply to the partnership debt, but whether, when the testator has expressly described what conversion shall take place and at what time, he has not thereby excluded every other conversion taking place than that which he has mentioned, under the authorities or powers given by his will? A conversion may take place from various other circumstances, such as if money be invested upon mortgage, the mortgagor may pay off the debt, and thus it would be necessarily converted. So also, if the testator had money vested upon any other redeemable security, or if, as in the present case, by the condition of the contract the partnership capital must necessarily be realized at the end of eighteen months after the testator's death, it would be actually converted.

In

(a) 19 *Beav.* 90.  
(b) 15 *Beav.* 193.

(c) 5 *De Gex & S.* 723.

1857.  
SKIRVING  
v.  
WILLIAMS.

In the present case, I entertain no doubt (although the question does not arise), that there would have been no authority to continue the property in the trade, if the conditions of the partnership articles had not necessarily required it to be realized. But the question is, what is to be done with the dividends of the Long Annuities, and with the profits of the partnership effects, until the time arrives when the one will expire and the other cease, and the assets be realized? Seeing no other direction whatever to convert them, but that which applies to the rest of the property, seeing also an intention generally not to convert, for the testator gives an express direction that the "*rents*" should be paid to the tenant for life, which shews he did not intend the freeholds and land to be sold, and seeing an express direction in what manner the property is to be sold, and the time at which it is to be converted, I think it must follow, that the Long Annuities were not intended to be sold or converted, but that the tenant for life was to enjoy them as long as they lasted.

I think the same observation applies to the profits of the money invested in the partnership until converted, that which is produced in the shape of profits, which may be more or less, is the income of the property. When realized, it must be invested in proper security, and the income of it will be what it produces; but up to that time the profits, whether they be more or less than what it would realize in the funds, is the income of the property, which the tenant for life is entitled to.

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NOTE.—See *Johnston v. Moore*, V. C. Wood, April 27, 1858.

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1857.

BONE v. POLLARD.

July 3, 10.

FROM 1804, *James Pollard* and his son carried on the business of farmers, in partnership, upon the terms of a deed of that date. The son having died in 1820, *James Pollard* continued to carry on the business of farmer with the assistance of his two daughters *Elizabeth* and *Susannah*, but for about four years before his death he became incapable of superintending the business, which was thereupon managed by his daughters.

A sum of Consols, invested by a father in the names of his two daughters, held, under the circumstances, to form part of his estate, and not to be an advancement to them.

*James Pollard* died in 1828, having bequeathed his residuary personal estate to his two daughters as tenants in common. The farming business was afterwards carried on by *Elizabeth* and *Susannah Pollard* down to the death of *Elizabeth*, which happened in 1854. The farm belonged to the father, and afterwards to the daughters under his will.

Two sisters carried on business as farmers. They had a joint account at their bankers, and an establishment and purse in common. They invested part of their money in the purchase of Consols in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes. Held, on the death of one, that the two sisters

The questions in this case were, as to the respective rights of the two sisters in various property, standing in their joint names, under the following circumstances:—In 1808, *James Pollard* and his son opened an account with their bankers in the names of "*James Pollard & Son*," and this was continued in the same name after the son's death and down to 1826, when the balance was transferred in the bankers' books to the account of "*Susannah and Elizabeth Pollard*," and the account was so continued down to the death of *Elizabeth*.

In were joint tenants of the

Consols, and tenants in common of the balance and of the deposit notes.



1857.

BONE

v.

POLLARD.

In 1821, *James Pollard* transferred into the joint names of his two daughters a sum of 5,000*l.* Consols, and between that period and his death he purchased various other sums of Consols in their joint names, out of moneys standing at the bankers, and the aggregate of the whole amounted, at the time of his death, to 11,000*l.* Consols. The dividends were, in the lifetime of *James Pollard*, received through the bankers, and carried to the credit of the account of "*James Pollard & Son*" until 1826, and afterwards to the credit of the account of "*Susannah and Elizabeth Pollard.*"

The first question was, whether the two sisters were entitled to this sum of 11,000*l.* Consols as tenants in common under their father's will or as joint tenants.

After the death of their father, the two sisters purchased at different times 3,600*l.* Consols, in their joint names, out of the moneys acquired by them from the sale of the produce and stock of their farm and also from dividends on the stock, but no declaration of title to or trust of or respecting the same was ever made, in writing or otherwise.

In *July*, 1824, a deposit or interest note account was opened at the bankers by the two sisters in their joint names, and six notes were given to them by the bankers between 1824 and 1836, payable to their order, and the interest was from time to time carried to their general account. At the death of *Elizabeth*, 1,433*l.* was due on the deposit or interest note account, and a sum of 1,675*l.* 8*s.* 4*d.* was also due on the balance of their general account, which was composed of moneys paid into the bankers by them, and of the dividends on the Consols and the interest on the interest notes.

The

The two daughters had also, on three occasions after their father's death, purchased real estate, part of which had been conveyed to them as joint tenants, and the remainder as tenants in common. The purchase-moneys appeared to have been advanced equally by them.

1857.  
BONE  
v.  
POLLARD.

The family had all lived together in an establishment common to all, and the daughters appeared to have kept the money in common.

Under these circumstances, the questions arose, whether the 11,000*l.* Consols formed part of the father's estate, or was to be regarded as an advancement to the daughters; whether, as to the Consols purchased after the father's death, and the balance at the bankers, and the deposit notes, the sisters were tenants in common or joint tenants.

The case came on upon the Chief Clerk's certificate stating the particular facts.

Mr. *R. Palmer* and Mr. *Dickenson*, for the Plaintiff, cited *Sidmouth v. Sidmouth* (a).

Mr. *Follett* and Mr. *Dewsnap* cited *Murless v. Franklin* (b); *Dyer v. Dyer* (c); *Edwards v. Fashion* (d); *Smith v. Warde* (e).

Mr. *Lloyd* and Mr. *Karslake*, for *Susannah*, cited *Henderson v. Eason* (f); *Lord Grey v. Lady Grey* (g); *Sugden's Ven.* (h).

*The*

(a) 2 *Beav.* 447.  
(b) 1 *Swan.* 13.  
(c) 2 *Cox*, 92.  
(d) *Prec. Ch.* 332.

(e) 15 *Sim.* 56.  
(f) 16 *Sim.* 303.  
(g) 1 *Ch. Ca.* 296.  
(h) Vol. 3, p. 262 (10th edit.)

1857.

BONE  
v.  
POLLARD.

*The MASTER of the ROLLS.*

I will look at the authorities before I dispose of this case.

---

July 10.

*The MASTER of the ROLLS.*

The question in this case is, whether the daughters of the original testator, one of whom is the testatrix in the cause, are interested as joint tenants or tenants in common in certain property, both real and personal.

The state of the case is this:—The father of the testatrix and his son were farmers, and carried on business in partnership together from the year 1804 till the death of the son in 1820. A deed of partnership, dated the 3rd of *November*, 1804, was executed, specifying, apparently with considerable minuteness, the terms of the partnership. They carried on the partnership until the death of the son. They had an account at the bankers in the joint names of the father and son, and the proceeds of the partnership were paid into that account.

After the death of the son, the father carried on the business with the assistance of his two daughters till his death in 1828. During the last four years of his life he was unable personally to superintend the business, which was entirely managed by his daughters, but still it was his business. He invested various sums of money, amounting to 11,000*l.* Consols, in the joint names of his two daughters. He kept the account at his bankers exactly in the same way as before, in the names of *James Pollard* and Son. The dividends on the Consols were paid into that joint account when received, and were applied by him apparently in the same

same way as they were before, in carrying on the business. Therefore, although he invested these sums in the names of his daughters, yet he kept the control over them, for he received all the dividends, which were placed to his account at the bankers, and were, in fact, employed by him in the ordinary manner.

1857.

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BONE  
v.  
POLLARD.

Cases of this description must be determined by their own facts, and I think that this case is not governed by any of the authorities which I have read on this subject. I think that the father meant this as a mode of avoiding payment of legacy duty, and that he intended the property to remain his own, to deal with it as he himself thought fit, and that this was the understanding between himself and his daughters. Accordingly, if at any time before his own death he had come and insisted on this money being restored to him, he would have been entitled to it. In point of fact, it may have been his intention that the investment should be for himself for his life and afterwards to be disposed of by his will, but that if he did not dispose of it by his will, it was to remain to his daughters. The details of the arrangement between them I have no means of ascertaining, but, from the mode of dealing with the fund, I am of opinion, that the father intended to keep this property as his own, and to have a control over it. The result is, that I am of opinion that the Consols must be treated as having passed by his will, under which the two daughters take the property as tenants in common.

Having come to that conclusion, I think that the same result will follow as to the investments that took place after 1826, when he changed the account, which, in point of fact, was a mode of continuing to carry on the business, and was still treated in the same manner. The result is, that the whole of the investments made

1857.

BONE

v.  
POLLARD.

during his lifetime, together with the account at the bankers, must be so treated.

Since the death of the father, a different mode of dealing has taken place. The two daughters have carried on the business of farmers in partnership together, and so far as they were partners, I am of opinion that they must be treated as tenants in common, and for that purpose, I think that the balance at the bankers, and also the deposit notes (which I treat as merely a part of the balance at the bankers), must be treated as part of the partnership assets. But they also invested a sum of 3,600*l.* in Consols in their joint names. I cannot treat that as anything other than joint property. They also purchased some land in their names as joint tenants, and that must go in joint tenancy: no question is raised about the land, and I refer to it only for the purpose of shewing that, in my opinion, the Consols must be treated in the same manner as the land which they bought. If they bought it as tenants in common, they intended it to be held as tenants in common, and if they bought it as joint tenants, they intended it to be held as joint tenants. They had exactly the same means of purchasing the funds as tenants in common as they had in respect of the land; it was only necessary to separate it into two moieties, if they thought fit so to do, but not having thought fit so to do, I am of opinion they must be treated as joint tenants. I must admit that there are several cases, such as *Sidmouth v. Sidmouth (a)*, which would seem at first sight to be at variance with the view I have taken in this case, but, in my opinion, this case depends on the facts and peculiar nature of the evidence in the cause, and, therefore it is not from doubting, or from not being prepared to

(a) 2 *Beav.* 447.

to follow those authorities, that I come to a different conclusion in this case. I will, therefore, make a declaration to that effect.

1857.

—  
BONE  
v.  
POLLARD.

Mr. *Dickinson*.—It follows from what your Honor has said, that they take the money in the house and the furniture as tenants in common.

The MASTER of the ROLLS.—Yes.

CHICHESTER v. CHICHESTER.

THE suit related to real estate. The will was disputed by the heir, and the Plaintiffs asked that the cause might stand over to prove the will.

Jan. 31.

Under the old practice, a disputed will could not be proved *vivâ voce* at the hearing; but liberty was given, under the new practice, to prove a will in Court, and the heir was allowed to cross-examine the witnesses.

The MASTER of the ROLLS. According to the old practice, a will could not be proved *vivâ voce* or by affidavit at the hearing<sup>(a)</sup>; because the heir had a right to cross-examine the witnesses, which could not be done in Court under the old system; but this is altered under the new practice, and I will allow the will to be proved in Court, and the witnesses may then be cross-examined by the heir if he think fit.

Mr. *R. Palmer* and Mr. *C. C. Barber*, for the Plaintiffs.

(a) *Seton*, p. 114 (2nd edit.).

1857.

*May* 25, 27, 28.PACKMAN *v.* VIVIAN.*June* 3.

Attendance by a medical man on the deceased, held, under the circumstances, to have been gratuitous, and his demand, as a debt against the assets, was rejected.

BY the settlement made on the marriage of Mr. and Mrs. *Vivian*, in 1841, 36,000*l.* stock were settled to the separate use of Mrs. *Vivian* for life, without power of anticipation, and afterwards for her husband for life, and, in the events which happened, she had power to appoint the fund itself by will.

For two years and upwards before the death of Mrs. *Vivian*, she, with the consent of her husband, lived separate and apart from him, and he in no manner paid for or contributed towards her maintenance or support.

The Plaintiff *Packman* was a doctor of medicine, and was duly qualified to practise as a surgeon and apothecary. He entered the service of the *East India Company* in 1836, and returned to *England* on sick furlough in 1853, where he had ever since resided. In 1853, he became acquainted with Mrs. *Vivian*, and was afterwards on terms of intimacy and friendship with her. He attended her professionally, but he received no fees, except on one occasion, when he prescribed for her servant.

On the 26th of *May*, 1854, Mrs. *Vivian* made her will, whereby she executed her power and, amongst other things, gave the Plaintiff a legacy of 300*l.*, and after the death of her husband, she gave to him, and afterwards to his children, 6,000*l.* She added a codicil on the 3rd of *May*, 1855, and she died on the 5th of *May*, 1855. The day before her death (4th of *May*), she addressed

addressed a note to her executors (which was not proved as testamentary), whereby she requested them to remunerate the Plaintiff in a handsome manner for his attendance on her.

1857.

PACKMAN  
v.  
VIVIAN.

The Plaintiff claimed 800*l.* from the testatrix's executors, for his professional attendance on her, and he instituted this suit against her surviving husband (who was the administrator of her general assets not subject to her power), and against the two executors of her will, praying payment of her debts out of the unappointed fund, or if that should be insufficient, out of the appointed fund, and for payment of his legacy of 300*l.*

There was considerable evidence, but the Court decided on the Plaintiff's evidence alone, and it is therefore unnecessary to refer to the rest.

The Plaintiff in his affidavit stated the particulars of his claim, in the following manner:—"On the 29th of September, 1854, Mrs. *Vivian* (who was then residing in the *Isle of Wight*, and was suffering from a dangerous disease of the organs of respiration), caused a telegraphic message to be sent to me at *Puckeridge*, in *Hertfordshire*, requesting me to proceed to the *Isle of Wight* in order to attend her; I accordingly immediately proceeded to the *Isle of Wight*, and thenceforth, at her repeated request, continued to act as her medical attendant until the 14th of *October*, 1854, when the testatrix having partially recovered, I left her and returned to *Puckeridge*.

"The said testatrix having, in *March*, 1855, been seized by a still more dangerous attack of the same disease, I resumed, at her request, on the 14th of *March*, 1855, my medical attendance upon her in the  
*Isle*



1857.  
  
 PACKMAN  
 v.  
 VIVIAN.

*Isle of Wight*, and thenceforth until her death continued to attend her and to make up and administer medicines for and to her."

"The testatrix repeatedly promised and undertook that I should be pecuniarily remunerated for my medical attendance upon her."

The Plaintiff, in his cross-examination, stated, that he was not actually in practice; that he had received but one fee since his return from *India*; that he practised occasionally as a physician between *May*, 1853, and *May*, 1855, assisting his father and brother (who were general practitioners), but that they did not pay him, and made no contract to pay him.

After stating a number of places where he had temporarily resided, he stated as follows:—"During the various peregrinations I was not practising as a physician as a rule. I prescribed occasionally at *Cheltenham* for different persons as a professional physician, but not charging fees, as an amateur and friend. When I practised at *Puckeridge*, I made no charge for myself as physician, but as assisting my father and brother, as general practitioners, I did prescribe as a physician, I visited patients for my father and brother and prescribed for them. My father and brother had no claim upon me, as I merely occasionally assisted them."

Mr. *R. Palmer* and Mr. *Goldsmid*, for the Plaintiff, argued that this was a debt, and that the separate estate of a married woman was liable for her debts; *Evans v. Evans* (a); *Hulme v. Tenant* (b); *Bullpin v. Clarke* (c); *Owens v. Dickenson* (d); *Murray v. Barlee* (e). And

(a) 3 *Jur.* (N. S.) 7.

(b) 1 *Bro. C. C.* 15.

(c) 17 *Ves.* 365.

(d) *Craig & Phil.* 48.

(e) 3 *Myl. & K.* 209.

And secondly, that the appointed fund was likewise answerable for her debts; *Vaughan v. Vanderstegen* (a); *Stead v. Clay* (b); *Fleming v. Buchanan* (c); *Jerney v. Andrews* (d).

1857.  
  
 PACKMAN  
 v.  
 VIVIAN.

Mr. Selwyn and Mr. Piggott for the executors, cited *Veitch v. Russell* (e).

Mr. Lloyd and Mr. Shapter, for the husband, argued that the testatrix was under no legal liability, and that neither her separate estate nor the appointed fund were liable. They cited *Nantes v. Corrock* (f); *Jones v. Harris* (g); *Anon.* (h); *Greatley v. Noble* (i); *Stuart v. Kirkwall* (k); *Re Pugh* (l).

Mr. R. Palmer, in reply, referred to *Macqueen on Husband and Wife* (m); *Clifford v. Laton* (n); *Moore v. Moore* (o); *Owen v. Homan* (p); *Nail v. Punter* (q); *Stead v. Clay* (b); *Simpson v. Lamb* (r).

*The MASTER of the ROLLS.*

June 3.

I think there is no debt in this case. I should have been glad if the question could have been tried at law, for it would be better sifted before a jury; but as the case has come before me, I must decide it upon the evidence, on the best opinion I can form. I have come to a conclusion unfavourable to the Plaintiff on his own evidence. His position in this country was this:—  
 he

(a) 2 *Drew.* 165.

(b) 4 *Russ.* 550.

(c) 3 *De G., M. & G.* 976.

(d) 6 *Mad.* 264.

(e) 3 *Q. B. Rep.* 928.

(f) 9 *Ves.* 182.

(g) *Ibid.* 497.

(h) 18 *Ves.* 258.

(i) 3 *Madd.* 79.

(k) 3 *Madd.* 387.

(l) 17 *Beav.* 336.

(m) Page 142.

(n) *Moody & M.* 101.

(o) 1 *Colly.* 54.

(p) 4 *H. L. Cas.* 997—1036.

(q) 5 *Sim.* 555.

(r) 26 *Law J., Q. B.* 121.

1857.

PACKMAN  
v.  
VIVIAN.

he was on sick furlough; he was entitled to practise for profit, but he did not do so; he prescribed and attended patients for his father and brother, but never took fees or sent in a bill. He did so also for other persons, but only as an amateur and friend, and took no fees.

In his cross-examination he states as follows:—  
“During his various peregrinations,” &c.(a). Was he less a friend to the testatrix than to the other friends for whom he prescribed, and upon whom he attended without fee? I will first consider how she must have regarded the matter. She must be taken to have known what his ordinary practice was. Why should she suppose that he intended to make a charge against her, whilst his ordinary practice was the contrary? He must have led her to suppose that he did not intend to make any charge as her physician or medical adviser. What confirms me is this:—when he attended her in *September*, 1854, was that the first time he prescribed for her? I infer the contrary; he went to her at *Matlock* and *Bath*; did he not prescribe there? If so, he made no charge and required no fee.

The fact that she left a statement to her executors suggesting that he should be paid is relied on by the Plaintiff. The note is in these words “that he should be remunerated in a handsome manner for his attendance on her.” The conclusion I draw from that is the very opposite to that which I am asked, namely, that he has a legal claim on her. If she had thought so, the letter was unnecessary, because the Plaintiff would have been paid out of her estate. It is evident that she considered that he had no legal claim which could be enforced against her or her estate; but taking into consideration the

(a) See *ante*, p. 292.

the time he had attended her, she wished him to have a handsome remuneration, and she desired her executors to pay it, not as a debt but as a bounty. The letter was not in the nature of a testamentary document, it has not been and I suppose it cannot be proved. In the view I take of the case, I believe that she would have been extremely surprised if, after his attendance, the Plaintiff had claimed to be paid for it as a debt, and had attempted to enforce it against her at law, and contrary to her inclination.

1857.

PACKMAN  
v.  
VIVIAN.

I next consider the Plaintiff's view of the case. How could he have expected payment? he never asked for payment, he never brought in any bill and never made any claim on her. He attended her from *September, 1854* to *October, 1854*; he then left her and did not return until *March, 1855*, and in the meanwhile he made no claim and sent in no bill. She wrote to him in *February* and asked him to come, (it was his duty to do so, if acting as her medical adviser,) but he did not go until the 14th of *March, 1855*, and he remained with her from that time until her death on the 5th of *May* following. It is obvious that she considered that his attendance was of very great value, but the question really is, whether, if she were now living, he could, contrary to her consent, and on her refusal to pay, enforce payment of any debt against her? I am of opinion he could not. His services were tendered as for a friend, and accepted as a friend; he was attending her in that character and on the understanding and agreement that he was acting merely as a friend and not intending to make any charge, and I think it clear, that if she had lived, he would never have thought of enforcing any claim against her.

I am at a loss to understand why he should make  
any

1857.

PACKMAN  
v.  
VIVIAN.

any exception in her case to the other cases in which his services were gratuitous. A great friendship was existing between them, so much so that she has thought fit to leave him and his children one-sixth of her disposable fortune.

On the whole of the facts of the case, I am of opinion that this was not a claim which could be enforced at law, and though she wished him to be liberally remunerated it was only as a matter of grace and favour.

I am therefore of opinion that the suit fails as a creditor's suit against her personal representatives.

#### JEFFERY v. DE VITRE.

July 28.

Bequest to a married woman "for the benefit of herself and such children as she then had or might thereafter have by her then husband, free from the control of her husband." Held, that she took for life, with remainder to such children.

THE testator bequeathed 3,000*l.* to *Louisa Jessie*, the wife of *James Remington*, "*for the benefit of herself and such children as she then had or might thereafter have by her then husband, free from the control of her husband.*"

The testator died in 1839.

*James Remington* died in 1842, having had four children only by *Louisa Jessie* the legatee.

The legacy had been invested and the income paid to *Louisa Jessie*; but the bill stated, "that doubts had arisen whether *Louisa Jessie* ought, according to the tenor of the will, to have received the income, and whether the legacy of 3,000*l.* was not, in fact, given to her and her four children as joint tenants.

Mr.

Mr. *Simpson*, for the Plaintiffs, argued that the gift for the benefit of herself and children constituted a joint tenancy.

1857.  
JEFFERY  
v.  
DE VITRE.

Mr. *Selwyn* for the trustees.

Mr. *Lloyd* and Mr. *C. Hall* for the Defendants.

The gift to her separate use shews an intention that she should take for life, with remainder to her children of a particular marriage. If this were construed to be a gift in joint tenancy, then it would be absolute and distributable at the death of the testator amongst the children then *in esse*. The natural construction is to let in all the subsequently born children, which can only be effected by giving a life interest to the mother, with remainder to her children by *James Remington*.

*Gordon v. Whieldon* (a); *Crockett v. Crockett* (b), were cited.

*The MASTER of the ROLLS.*

I think this is the proper construction of the will. All the children were intended to take, and I agree that this can only be effected by giving a life interest to the mother and the fund afterwards to the children.

(a) 11 *Beav.* 170.

(b) 2 *Phil.* 553.

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DECREE.

Declare that *Louisa Jessie, &c.*, is entitled to the dividends for life, and that the four children are entitled to the legacy, as joint tenants, upon her decease.

1857.



## PELLATT v. NICHOLLS.

June 24.

Whether any part of the evidence in chief can be taken orally, on a motion for a decree, *quære*.

IT having been suggested, that a motion for an injunction should be turned into a motion for a decree, a question arose, whether, on a motion for a decree, it was possible to take the evidence orally, the Defendant objecting, that he could not compel a witness to make an affidavit.

On the one hand, it was said, that the statute 15 & 16 *Vict.* c. 86, s. 15, giving the right to move for a decree, merely authorized the filing of affidavits in support of it, and that by the 23rd General Order of 2nd *May*, 1852 (*a*), a list of the "affidavits to be used in support of such motion was to be set forth at the foot of such notice"; and that the affidavits on behalf of the Plaintiff and Defendant were to form the whole evidence, the 26th Order (*b*) directing, that "no further evidence" should be used without leave of the Court.

On the other hand, it was said, that the 40th section of the 15 & 16 *Vict.* c. 86, giving a party a right to have witnesses examined orally, was general and applicable to every "claim, motion, petition or other proceedings before the Court" (*b*); that it had been decided that a motion for a decree was within the meaning of the 40th section, so as to entitle a party to cross-examine a witness; and that in *Wigan v. Rowland* (*c*) the Court had ordered a *subpœna duces tecum* to issue upon a motion for a decree.

Mr.

(*a*) *Ord. Can.* 467.  
(*b*) *Ord. Can.* 468.

(*c*) 10 *Hare, App.* xviii.

Mr. *R. Palmer* and Mr. *Jessel* for the Plaintiff.

1857.

Mr. *Follett* and Mr. *Wickens* for the Defendant.

PELLATT  
v.  
NICHOLLS.

The MASTER of the ROLLS did not decide the point, but said his impression was, that it could be done, by giving a list of the witnesses to be examined. He added that the intention certainly was, that parties should be at liberty to have their evidence taken orally in all cases.

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NOTE.—See 1 *Daniell's Pr.* 662 (3rd edit.)

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#### THE ATTORNEY-GENERAL v. BUSHBY.

July 4, 6.

**I**N 1494, *Richard Curteis* devised a certain messuage or tenement in *Grantham*, in the county of *Lincoln*, which he had already vested in feoffees, to the town and commonalty of *Grantham* aforesaid for ever, for the discharge of the tax of the commonalty of *Grantham* to King Henry the Seventh and his successors for ever and henceforth to be granted.

Property was devised to the town and commonalty of *Grantham*, for the discharge of the tax of the commonalty to the king for ever. The tax referred to was unknown, and the income had been applied to the use of poor freemen and their widows. Held, that this application was improper: that this was a charity property belonging to the town generally, and not to the corporation beneficially; and a scheme was directed.

It was not known what was meant by the tax referred to; but it had been the invariable practice for the freemen of the town of *Grantham*, at their annual meetings, to elect, out of their own body, twelve persons, whom they denominated "key bearers," to manage the charity for the current year.

The annual income, after certain deductions, was now appropriated and dispensed as follows:—To the fifty oldest freemen on the roll, 10*s.* each a year; to the fifty next oldest freemen, 5*s.* a year each; to the widows of freemen (now thirty-one), 5*s.* a year each. The "key bearers" applied the residue of the income of the charity in giving an annual supper to the freemen.

The





1857.

ATTORNEY-  
GENERAL  
v.  
BUSHBY.

The freemen of *Grantham*, and the "key bearers" on their behalf, insisted that they had vested in themselves the absolute beneficial right and title to the estates and property of the charity called "*Curteis' Charity*."

On the other hand, the *Attorney-General* submitted, that the present mode of appropriating the income of the charity was an improper application, and that it was not in any manner warranted by the instrument of foundation. That it was desirable that the rents and profits of the charity property should be applied in such manner as this Court should direct, for the benefit of the inhabitants of the town of *Grantham*, and that a proper scheme should be settled for that purpose under the direction of this Court.

The information prayed a declaration, that the present application of the income of the charity was illegal, and not warranted by the original foundation of the charity, and that a scheme might be settled for the future application of the rents and profits of the charity property, under the direction of the Court, for the benefit of the inhabitants of the town of *Grantham*.

Mr. *T. H. Terrell*, in support of the information, referred to the *Attorney-General v. The Corporation of Exeter* (a).

Mr. *Selwyn* and Mr. *Fischer*, for the Defendants, argued, first, that this was not a charity, but a gift to the corporation; and secondly, that if it were a charitable foundation, the income had been properly applied. They referred to *Attorney-General v. Blizard* (b); *Tomlins' Law Dictionary*, title "Commonalty."

*The*

(a) 2 *Russ.* 45 and 3 *Russ.* 395.

(b) 21 *Beav.* 233.

*The MASTER of the ROLLS.*

I must make a decree, I do not see how I can avoid it. Here is a charity property given in exoneration of the tax granted for the benefit of King *Henry VII.* and his successors for ever on the commonalty of *Grantham*, and it appears that the freemen of the borough of *Grantham* have divided this among themselves. I am satisfied that they are not entitled to this as their own property, but that this is a charity gift, in exoneration of a tax imposed on the community at large, and therefore is a charity given for the benefit of the community at large. I am therefore of opinion that the *Attorney-General* is entitled to a decree, and that I must consider what is the proper application of the fund ; but I confess that I do it with considerable reluctance considering its smallness.

1857.

ATTORNEY-  
GENERAL  
v.  
BUSHBY.  
July 6.

I think it proper to distinguish this case, on the one side, from the *Attorney-General v. The Corporation of Exeter*, and from the *Attorney-General v. Blizzard (a)*. In the first case, there was a clear charity for the benefit of the poor of the city of *Exeter*, and for the support of a chaplain. Neither of these trusts had been performed, but the trust fund had been applied for the general purposes and benefit of the town, that is, for repairing the city gaol, the maintenance of the prisoners, and various other purposes. With respect to the *Attorney-General v. Blizzard*, the charity was solely for the benefit of the ratepayers, and not of persons unable to pay the rates, and I therefore thought, that the trust of the original foundation had been properly performed by the manner in which the trustees had hitherto carried it into effect, for there may be a trust for the benefit of ratepayers just as much as for the benefit of persons who

(a) 21 *Beav.* 233.

1857.

ATTORNEY-  
GENERAL  
v.  
BUSHBY.

who are not ratepayers. But in this case the object of the charity being in exoneration of a tax which affected the whole community, and as that tax does not now exist, I think that the income must be applied to the benefit of the whole community. I must therefore make a decree, and direct a scheme, and the income must be applied according to the trusts of the foundation of the charity, which were for the benefit of the town of *Grantham* or the inhabitants of the town of *Grantham*.

## DECREE.

Declare that the property, in the pleadings mentioned, does not belong beneficially to the freemen or commonalty of *Grantham*, but is a charitable property belonging to the town of *Grantham* in general.  
Direct a scheme.

## BRIDGMAN v. GILL.

July 17.

A fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone, they, in 1843, transferred it to his account, and thereby obtained payment of a debt due from him to them. Held, that the trustees might sue the bankers in this Court to have the trust fund replaced, and that the Statute of Limitations was inapplicable.

THE Plaintiffs, *Bridgman* and *Phillips*, were the trustees and executors of the will of *Truscott*, who died in 1834. Under this will, they held his residuary estate upon the trusts of the marriage settlement of the testator's daughter Mrs. *Gribble*, of which they were also trustees. These trusts were for Mrs. *Gribble* for life, with remainder to Mr. *Gribble* for life, with remainder to their children. The Plaintiffs, as trustees, opened a trust account with the Defendants Messrs. *Gill*, who were bankers, and in May, 1842, a sum of 770*l.* 2*s.* 3*d.* was carried over in the bankers' books to the credit of the Plaintiffs, as executors of *Truscott*. The Court held, from the heading of the account as well as from the evidence in the cause, that the bankers had notice that this was trust money. The Plaintiffs deposed, that this sum was, by agreement with the bankers, left with them at interest, and that the bankers agreed to pay the interest, from time to time, to Mrs. *Gribble*,

*Gribble*, until they were called upon to repay the principal sum. This agreement, as to paying the interest to *Mrs. Gribble*, was however denied by the bankers.

1857.

BRIDGMAN  
v.  
GILL.

*Mr. Gribble* carried on business as a grocer, in partnership with *Luscombe*, and in *July*, 1843, the bankers being the holders of an acceptance of Messrs. *Gribble and Luscombe* for 750*l.*, which the latter were unable to meet, *Mr. Gribble*, at the suggestion of the bankers, but without any authority from the Plaintiffs, drew a cheque for 750*l.* against the trust account; the bankers thereupon debited the account with the 750*l.*, and thereby the bill became paid. Some conversation took place at the time, as to *Gribble's* obtaining the Plaintiffs' sanction to this application of the money, but it did not appear to have been ever applied for or obtained. Some other small sums were standing to the Plaintiffs' account, and the balance of it, with interest, was carried forward from year to year down to 1855, when 107*l.* 12*s.* 3*d.* appeared standing to the Plaintiffs' credit in the bankers' books.

In 1854, *Gribble* became bankrupt, and the Plaintiffs then first discovered that the 750*l.* had been misapplied in 1843; they filed this bill against the bankers alone, praying payment of the 770*l.* 2*s.* 3*d.* and interest, to be applied upon the trusts of the settlement.

*Mrs. Gribble* had died in *November*, 1855.

The Defendants insisted, amongst other things, on the Statute of Limitations (*a*), but they offered to pay the balance of 107*l.* 12*s.* 3*d.*

Mr.

(*a*) See *Pott v. Clegg*, 16 *Mee. & W.* 321.

1857.  
  
 BRIDOMAN  
 v.  
 GILL.

Mr. *R. Palmer* and Mr. *Shapter*, for the Plaintiffs.  
 The only defence to this suit is the Statute of Limitations, but that does not apply to the case of a breach of trust. "Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust;" *Keane v. Roberts* (a). Here the bankers had notice that the fund was a trust fund, and without any authority, they have applied it in payment of their personal demand against *Gribble* and his partner; they are therefore responsible for it; *Wilson v. Moore* (b); *Pannell v. Hurley* (c); *Ex parte Gowers* (d); *Ex parte Woodin* (e); *Ex parte Barnewall* (f); *Pennell v. Deffell* (g).

In *Harvey v. Harvey* (h), decided by Sir *John Leach*, and affirmed by Lord *Cottenham*, "*T. H.* by a letter, reciting that advances to the amount of 2,400*l.* had been made by Messrs. *B.*, her bankers, to her son, at her request, undertook to discharge the same, and authorized Messrs. *B.* to retain any sum belonging to her, or that they might have in her name in their hands, and transfer the same to the account of her son, for the purpose of discharging the debt due from her son to them. *T. H.*, who was executrix and trustee for the benefit of her children, under the will of her husband, had a private and a trust account with her bankers, which were for some years kept separate, and afterwards blended. Messrs. *B.* transferred the sum of 2,010*l.*, being the produce of the resale of an estate purchased by *T. H.* with the testator's money, to the account

(a) 4 *Madd.* 357.

(b) 1 *Myl. & K.* 126, 138, 145.

(c) 2 *Colly.* 241.

(d) 2 *Deac.* 207.

(e) 3 *Mont., D. & D.* 399.

(f) 6 *De G., M. & G.* 795, 801.

(g) 4 *De G., M. & G.* 372.

(h) 4 *Myl. & Keen*, 41 (unpublished).

account of her son, and claimed to be entitled to it under her guarantee. It was held, under the circumstances, and particularly from the mode in which the banking accounts were kept, that Messrs. *B.* had notice that the sum so transferred was trust money, and that they were bound to repay it to the testator's estate."

1857.  
BRIDGMAN  
v.  
GILL.

*Mr. Selwyn* and *Mr. Baggallay*, *contrà*. As between the Plaintiffs and the Defendants, this is the ordinary case of an account between a banker and his customer, on which the Plaintiffs' remedy is by action at law, and the Statute of Limitations is therefore clearly applicable.

Though the *cestuis que trust* might have sued the Bankers in this Court, yet it is not competent for the Trustees to resort to this jurisdiction; *Foley v. Hill* (a).

*The MASTER of the ROLLS.*

July 17.

The most remarkable thing in the case is, that the Defendants should have resisted the relief sought. The case, as it stands upon the undisputed facts, is this:—In 1843, a sum of money was standing in the Defendants' books to the credit of the Plaintiffs, and which the Defendants transferred to themselves in discharge of a debt due to them from another person, and this was done without the slightest sanction or authority of the Plaintiffs to support it.

I am disposed to concur with *Mr. Baggallay*, that if the matter simply stood there, the proper mode of proceeding would have been for the Plaintiffs to have brought an action at law against the Defendants to recover the money.

But

(a) 1 *Phil.* 399.

1857.  
BRIDGMAN  
v.  
GILL.

But the case does not rest there, for I find from the evidence and from the examination of the Defendants' books, that this sum was standing to a trust account; and that the bankers had clear and distinct notice that this money was held by the Plaintiffs upon certain trusts. I think it totally immaterial that the Defendants had not notice of what the precise trusts were; all that was necessary for them to know was, that this was a trust account, and that the fund was held by the Plaintiffs as trustees. Having that notice, the Defendants allowed the 750*l.* to be applied in payment to themselves of a debt due to them from another person, and which he had not sufficient assets of his own to pay. This being so, it is admitted, very properly, that if this had been a suit instituted by the infant children, stating and proving that these bankers had notice of the trust, and that they and the trustees had together committed this breach of trust, no answer could have been made to that case. In my opinion the trustees here represent the *cestuis que trust*, and are entitled to represent them for the purpose of compelling the Defendants to make good the trust fund, if notice of the trust be proved.

Upon the facts before me, I entertain no doubt whatever, that it is proved that the Defendants had notice that this fund was held by the Plaintiffs upon the trusts of *John Truscott's* will, and accordingly I must make a decree for the payment by the Defendants of this sum, with the interest, according to the arrangement on which this sum was deposited, and the costs of the suit.

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1857.

BENWELL v. INNS.

**BENJAMIN WRIGHT** carried on a dairy farm at *Peckham Rye*, known as the "*Friern Manor Dairy Farm*," having, in connection therewith, two *London* establishments for the sale of milk, one in *Farringdon Street*, and the other in *Charles Street, Grosvenor Square*; the latter of which establishments was under the management of the Plaintiff, and was carried on under the title of "*The Friern Manor Dairy Farm*."

July 18, 28.

The servant of a milkman, in *C. street, London*, agreed not to carry on the like business within three miles therefrom. Held, that this was not an undue restraint of trade, and the servant was restrained, by injunction, from violating his agreement.

By an agreement dated the 26th of *July, 1852*, *Benjamin Wright* agreed to take *Jesse Inns* into his service as a general servant, and *Jesse Inns* thereby agreed to serve *Benjamin Wright*, his executors, administrators, assignees, copartners or successors in the said business, either in *London* or at *Peckham Rye*, as *Benjamin Wright*, his executors, administrators, assignees, copartners or successors, might direct or require, for one month certain from the date of the agreement, and until the expiration of a month's notice, to be given by either party to determine the contract and service, at such wages as might, from time to time, be agreed upon. In consideration whereof, *Jesse Inns* thereby agreed well and faithfully to serve *Benjamin Wright*, or his future copartner or copartners, execu-

*A.* agreed to take *B.* as his servant, "at such wages as might from time to time be agreed on," and *B.*, on his part, agreed to serve *A.*, and not to set up trade for himself within certain limits. *B.* accordingly entered into and continued in *A.*'s service, at wages agreed on. Held, that there was a good and valuable con-

sideration to support the agreement as against *B.*, and the Court enforced it.

A milkman, carrying on business in three places, took the Defendant into his service. The Defendant engaged, as regarded the milkman, his assignees and successors, not to carry on a similar trade within certain limits. *A.* sold his branch business at one of the three places to the Plaintiff, who retained the Defendant in his service. Held, that the Plaintiff, as assignee and successor of part of the business, was entitled to the benefit of the Defendant's contract.



1857.

BENWELL  
v.  
INNS.

tors, administrators, assignees or successors, in the said business, *and would not*, during the continuance of such service, nor within the space of twenty-four calendar months after quitting or being discharged from the same, commence, *carry on or be concerned, in any way whatsoever, either as servant or master, in the trade or business of a cowkeeper, milkman, milk-seller, or milk carrier, within the distance of three miles from Charles Street, Grosvenor Square.*

On the 27th of *November*, 1854, *Benjamin Wright* assigned to the Plaintiff *Benwell* the goodwill of the branch business of a dairyman carried on in *Charles Street*, and all benefit and advantage thereof, and all and singular the shop and trade fixtures thereof and plant, and the yokes, milk cans and other utensils on the said premises belonging thereto, or to the said branch business. And *Benjamin Wright* thereby covenanted not to carry on a similar business within certain limits, or interfere with the Plaintiff in the enjoyment of the said business.

After the agreement of 1852, the Defendant continued in the service of *Benjamin Wright*, and was attached to the branch business in *Charles Street, Grosvenor Square*, as a general servant; and upon the assignment of that business to the Plaintiff, the Defendant continued to serve the Plaintiff as the successor of *Benjamin Wright*, and he continued to be employed in the business in the district aforesaid as a general servant, under the terms and conditions of the agreement of the 26th of *July*, 1852, which, upon the assignment, was handed to the Plaintiff as one of the incidents or appurtenances of the business.

A disagreement occurred as to the Defendant's  
weekly

weekly wages and perquisites, and on the 8th of *June*, 1857, the Defendant, in accordance with the terms of the agreement of 1852, gave a notice, addressed to *Benjamin Wright*, but delivered to the Plaintiff, to the effect that he should not require the situation of carrier after the 7th day of *July* then next.

1857.  
BENWELL  
v.  
INNS.

The Plaintiff accepted the notice, and the Defendant quitted his service on the 4th day of *July*, 1857, before the expiration of his notice. The Defendant then set up in the milk business on his own account, and served a great many of the Plaintiff's customers in the *Charles Street* district with milk; he occupied himself in endeavouring to supplant the Plaintiff in his business within the *Charles Street* district, and he threatened to carry on business within that district, as a carrier of milk, in competition with the Plaintiff, and to use the connection and introduction which he had gained in the service of *Benjamin Wright* and the Plaintiff for the purpose of attracting custom to himself within the district. Previously to the Defendant leaving his employ, the Plaintiff twice cautioned him against setting up in business.

The Plaintiff alleged, that such conduct was at variance with the agreement of the 26th day of *July*, 1852, and he instituted this suit, praying that the Defendant might be restrained by injunction from commencing, carrying on or being concerned in any way whatever, either as servant or master, in the trade or business of a cowkeeper, milkman, milk seller or milk carrier, within the distance of three miles from *Charles Street, Grosvenor Square*, for the space of twenty-four calendar months.

Mr. *A. Hobhouse* now moved for an injunction in the terms of the prayer.

Mr.

1857. Mr. *J. H. Taylor*, *contra*, insisted on the invalidity of the contract.  
 BENWELL  
 v.  
 INNS.

*The MASTER of the ROLLS.* The validity of the contract must be decided at the hearing, but independently of any contract the Defendant ought to be restrained from serving the Plaintiff's customers until the hearing.

July 28. The cause now came on upon a motion for a decree.

Mr. *A. Hobhouse*, for the Plaintiff, argued, that the acts of the Defendant were a direct infringement of his contract. He argued, that the only real relief which the Plaintiff could have against the Defendant, defending, as he was, *in formâ pauperis*, was by restraining him by injunction from infringing his contract.

Mr. *J. H. Taylor*, for the Defendant. First, the Plaintiff is not the assignee of *Wright's* business, he is entitled only to a portion of the subject-matter of the agreement of 1852, namely, to the *Charles Street* district, and therefore he is not entitled to the benefit of the covenant. Secondly, there was no sufficient consideration given to the Defendant to support the agreement of 1852. *Wright* agreed to pay nothing, the wages were only to be such as might, from time to time, be agreed upon. Thirdly, the engagement on the part of the Defendant not to carry on his business of a milkman within three miles is void, as an undue restriction of trade, which the law discountenances. He cited *Avery v. Langford* (a); *Hitchcock v. Coker* (b); *Proctor v. Sargent* (c).

*The*

(a) *Kay*, 663.  
 (b) 6 *Ad. & Ell.* 438.

(c) 2 *Mann. & G.* 20.

*The MASTER of the ROLLS.*

1857.

  
BENWELL  
v.  
INNS.

I am of opinion that this was a perfectly good agreement at the time it was entered into, and that it is equally so now. The validity of the contract must be determined at the time it was executed, and although subsequent facts might determine it, yet they could not affect its original validity as a contract.

The first objection is, that the Plaintiff is not the assignee of *Wright*. I think he is, and that this objection is not tenable on the part of the Defendant, and that it is impossible to say that he is not the assignee. *Wright* assigned to him the *Charles Street, Grosvenor Square*, branch of the business, the Plaintiff continued the business as the successor of *Wright*, and I see nothing to make this agreement void upon the ground of its being the assignment of part of the business.

I also think that the Defendant fails in shewing there was no consideration for the agreement of 1852. *Wright* agreed to take the Defendant into his employ at certain wages to be agreed on; they were agreed on, and were regularly paid. That is a perfectly good and valuable consideration to support the agreement, unless the wages were merely illusory. But I do not enter into the amount of these wages; they were to be paid to the Defendant, and he ought to have considered when he entered into this agreement whether they were proper or not. He was told he might enter into this agreement or quit, and he signed it.

Moreover, this is sworn to be a usual stipulation in the trade, and it is evident that the Defendant was perfectly aware of its effect at the time he entered into it.

Thirdly.

1857.  
  
 BENWELL  
 v.  
 INNS.

Thirdly. It is said that the contract is void as an undue restriction of trade. If one, having a milk walk of one mile in diameter, were to require a restriction far exceeding the limits of his walk, and there were no explanation of the necessity of such restriction, that might be an undue restraint of trade, but I am of opinion that this agreement was confined within reasonable limits.

The Plaintiff is therefore entitled to an injunction in the terms of the agreement for the district mentioned.

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CROFT v. GOLDSMID.

July 20, 22.  
 A builder agreed to take some land on a building lease, and to erect houses within a specified period, the landowner making him certain advances. There was a clause of forfeiture, in default of their being completed within the time. Relief against a forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract.

IN May, 1854, the Plaintiff, a builder, proposed to the Defendant, the owner of land at *Brighton*, to take a portion of it on a building lease.

The proposal, which was in a printed form, was as follows:—" *Brighton, Wick Estate, 3rd May, 1854. To Sir Isaac Lyon Goldsmid, Bart.—I, George Croft, of 17, Farm Road, Hove, in the county of Sussex, builder, propose to take from you seven plots of land, situate on the west side of Palmeira Square, frontage 25 feet each, depth 100 feet, including area, the 7th, 8th, 9th, 10th, 11th, 12th and 13th plots, south from New Western Road, for the term of ninety-nine years from the 24th of June, 1854, at the rent of 42*l.* 13*s.* per house for the first year, and after that time at the rent of 85*l.* 6*s.* per house per annum, with the right, within five years from the said 24th of June, 1854, to require, after completing the houses and paying off the advances, a conveyance of the freehold, subject to a rent-charge of*

Of 68*l.* 4*s.* per house, to be reserved to you and your heirs; to build a house on each plot, according to the plans and specifications of the surveyor of the estate, to have advanced on each house by instalments, as under, a sum not exceeding two-thirds of the actual costs thereof, the total of such two-thirds, however, is not to exceed 2,000*l.* per house, to be repaid not earlier than two years and within five years from the 24th of June, 1854, and to bear interest at 5*l.* per cent. per annum, payable half-yearly. The carcasses to be built and covered in within twelve months, and the houses completely finished, including stoves, bells and fixtures, within twenty-four months from the said 24th of June, 1854, *otherwise the agreement to become void, and you shall have power to enter the land and take possession thereof*, without notice or the necessity of taking any legal proceedings to recover the same. All materials that may be delivered, by or for me, upon the premises or on any part of the said Wick Estate, whether fixed or otherwise, are to become subject to a lien for any advances that may have been made by you, and if there be any stoppage in proceeding with the building, your surveyor or agent is to be at liberty to use any materials belonging to or delivered upon the premises by or for me, and proceed with finishing the houses, so far as such materials will permit, and charge me with the cost of labour and also with the value of any additional materials that may be required, and the sums so chargeable are to be deducted from the amount agreed to be, and added to that which may then have been, advanced; but this is to be no bar to your taking possession of the property, if you should think fit, and annulling the proposal or any agreement founded thereon. I further propose to pay proportionate expense for forming sewers and repairing roads; to pay proportionate share of any party-wall built by adjoining owners that

1857.

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CROFT  
v.  
GOLDSMID.

1857.  
CROFT  
v.  
GOLDSMID.

that I may use; to pay surveyor for plans and superintendence. Upon the above proposal being accepted by you, I do undertake to execute an agreement, with the like covenants and provisions as are contained in similar agreements, signed by other parties taking the land on the estate, and to pay the expenses of the same.

*"George Croft."*

*"Note.* The instalments to be such as your surveyor for the time being shall from time to time certify that I may be entitled to.

*"George Croft."*

This proposal was accepted and agreed to by the Defendant, who signed a memorandum written at the foot thereof, which was as follows:—"I accept of the foregoing proposal. *Isaac L. Goldsmid.*"

It was verbally arranged and agreed between the Plaintiff and Defendant, that the advances should be made by weekly instalments, the amount of each of such instalment to be equal to two-thirds of the cost then actually incurred by the Plaintiff in erecting the houses.

The Plaintiff commenced building the houses, but the bill alleged, that the advances made by the Defendant (which amounted to 14,349*l.*), being less than what the Plaintiff was entitled to under the proposal and agreement, the Plaintiff, on the 26th of *January*, 1856, was compelled partially to discontinue the building and works, and on the 7th of *March*, 1856, he was obliged wholly to discontinue them.

The bill stated, that the Defendant had lately taken possession of the nine plots of land, and of the buildings,

ings, fixtures, materials and things belonging to the Plaintiff on or about the same, and had converted the same to his own use, and that the Defendant, contrary to good faith and to the terms of the said proposals and agreements, claimed to hold the buildings, fixtures, materials and things for his own benefit, discharged of all right and interest of the Plaintiff therein or thereto, pretending that the same had, under the circumstances therein appearing, become absolutely forfeited to him.

1857.

  
CROFT  
v.  
GOLDSMID.

The Plaintiff on the contrary insisted, that under the proposals and agreements, the taking possession by the Defendant of the plots of ground, carcasses, materials and things under the circumstances aforesaid, could not operate to create an absolute forfeiture of the Plaintiff's rights and interests therein: and he submitted and insisted, that the Defendant was only entitled to a lien upon the carcasses, materials and things, and upon the Plaintiff's interest therein, and to treat the same as a security for the repayment of the moneys advanced by him to the Plaintiff, with interest.

The Plaintiff charged that, under the circumstances, the Defendant ought to come to an account with him for the amount of such advances, and of the value of the buildings, fixtures, materials and things, and of the Plaintiff's interest therein respectively, and to pay to him the excess of the value thereof as compared with the amount of such advances.

The bill prayed as follows:—

1. That it may be declared, that the Defendant is entitled only to a lien upon the buildings, fixtures, materials and things, and to hold and treat the same only



1857.  
CROFT  
v.  
GOLDSMID.

only as a security for the repayment of the moneys advanced by the Defendant to the Plaintiff, under the said proposals and agreements, with interest.

2. That an account may be taken of the amount of such advances as aforesaid, and of the value of the said carcasses, fixtures, materials and things, and of the Plaintiff's interest therein.

3. That the Defendant may be ordered and compelled to pay to the Plaintiff the amount, which, upon the taking the account aforesaid, shall be found to be the excess of the value of the said carcasses, fixtures, materials and things, and interest, as compared with the amount of such advances as aforesaid, and interest thereon, at the rate aforesaid.

The Defendant said, that he had not taken possession, but he insisted he was entitled to re-enter upon the premises and hold them as his absolute property.

It was proved satisfactorily that the sum of 14,349*l.*, advanced by the Defendant, was two-thirds of the amount expended by the Plaintiff.

Mr. *R. Palmer* and Mr. *C. M. Roupell*, for the Plaintiff.

Mr. *Follett* and Mr. *F. H. Goldsmid*, for the Defendant, relied on *Ranger v. The Great Western Railway Company* (a).

*The MASTER of the ROLLS* reserved judgment.

*The*

(a) 5 H. L. Cas. 172.

*The MASTER of the ROLLS.*

I have read the evidence in this case very carefully. It is plain to me that the Defendant has a perfect right to insist on the forfeiture, for the failure to perform the agreement has not arisen from any default of the Defendant. The agreement consists of certain arrangements as to building houses and advances to be made by the Defendant, and the Defendant had the option of one of two things:—he might insist on the forfeiture, or he might carry on the buildings at the expense of the Plaintiff. This latter power does not qualify or abridge the right of forfeiture, which the Defendant now insists on.

The agreement has not been performed by the Defendant, and the question is simply this:—Is the Defendant entitled to insist on the forfeiture; has the inability of the Plaintiff to perform his part of the agreement been occasioned by the conduct of the Defendant? because if it has been, he could not insist on the forfeiture. I have read the evidence to see if this were so or not; I am clear that it is not, and that the inability of the Plaintiff to perform his part of the agreement has not arisen from anything done or omitted to be done by the Defendant which the Plaintiff was entitled to.

The evidence establishes that the sum of 14,349*l.* is at least two-thirds of the actual cost which has been incurred. I should judge from the evidence, that this is a liberal valuation, and it appears that this amount has been duly advanced by the Defendant to the Plaintiff; the result is, that the case fails, and the bill must be dismissed with costs.

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1857.

CROFT  
v.  
GOLDSMID.  
July 22.

1857.

## REID'S CASE.

*In re* The ELECTRIC TELEGRAPH COMPANY  
OF IRELAND.

July 25.

A father voluntarily transferred shares in an incorporated company to his infant son.

The company was afterwards wound up (the son being still an infant). Held, that the father was a contributory.

THIS company was incorporated by an Act of the 16 & 17 *Vict.* c. cxxiii. which special Act incorporated in it The "*Companies Clauses Consolidation Act*" (a).

Mr. *William Reid* was a shareholder in the company in respect of 1,000 shares, 750 of which were paid-up shares. By deed dated the 16th of *January*, 1856, he in consideration of 5*s.*, transferred them to his son *John Reid*, who was then a minor, of the age of about fifteen.

A certificate of the transfer was granted, which was signed by the secretary of the company, and the name of *John Reid* still stood in the books of the company as holder of the shares.

According to the affidavit of *William Reid*, the transfer was made by him *bonâ fide*, and "was executed long before he had any intention or suspicion that the company was likely to become insolvent or be wound up."

In *February*, 1856, *John Reid*, the son, was elected director, in consequence, as it seemed, of the inability of the directors to get any other qualified shareholder to fill that office, and on the motion being made to elect him,

(a) 8 & 9 *Vict.* c. 16, s. 79.

him, his brother informed the directors that he was but a boy at school," to which the directors replied to the following effect:—"Oh, that is of no consequence, we know he comes of a good stock, and it is quite sufficient for our purpose." He however declined the honour.

1857.

REID'S CASE.  
In re The  
ELECTRIC  
TELEGRAPH  
COMPANY OF  
IRELAND.

In May, 1856 (a), the company was ordered to be wound up, and the Chief Clerk placed the father on the list of contributories in respect of the 1,000 shares.

This was an appeal from the certificate of the Chief Clerk.

Mr. Baggallay, for William Reid, the father. First, the transfer by the father to the son is not void; the son may repudiate it when he attains twenty-one, but until then, he remains a shareholder in the company and entitled to the benefit to be derived from the shares. The son ought to have been placed on the list of contributories, in the first instance, and removed when it had been shewn that he had, by disclaimer, ceased to be interested in the shares standing in his name. As regards the 750 paid-up shares, they may be of value, and therefore it may be to the interest of the infant to retain them. He cited *Newry and Enniskillen Railway Company v. Combe* (b); *The Birkenhead, &c. Railway Company v. Pilcher* (c); *The North Western Railway Company v. M'Michael* (d); *Ketley's Case* (e), and he distinguished this case from *Litchfield's Case* (f) and *Henessey's Case* (g).

Secondly. The company have recognized the son as the

(a) 22 Beav. 471.

(b) 5 Rail. Cas. 633.

(c) 6 Rail. Cas. 564.

(d) 5 Esch. 114.

(e) Brownlow, 120.

(f) 3 De G. & Sm. 141.

(g) 3 De G. & Sm. 191.

1857.

REID'S CASE.  
*In re* The  
ELECTRIC  
TELEGRAPH  
COMPANY OF  
IRELAND.

the holder of the shares, by granting the certificate of ownership, and by afterwards electing him a director when they knew him to be an infant.

Mr. *Selwyn* and Mr. *Nalder*, for the official manager, were not heard.

*The MASTER of the ROLLS.*

I entertain no doubt on this question, so far as the company is concerned, and I am of opinion that the transfer of the 1,000 shares must be considered a nullity. With respect to the cases cited from the Common Law Reports, it certainly happens that a difficulty might arise with reference to the right of the son to claim, if any benefit is to be derived from the shares; but in this Court, if it were called upon to decide (which it must sometimes be obliged to do, as in the case of an infant becoming the transferee of shares in a railway company), whether it would be expedient for him to repudiate them, then the Court would exercise that discretion, which it sometimes exercises on behalf of infants, and say whether it would or would not be for the benefit of the infant to retain the shares. I am relieved from this difficulty, which could only arise in the case of a "going" company, because the Court, having made an order to wind-up this company, I know that the interest of the infant to accept or repudiate the shares will be ascertained in the course of the winding-up of this concern, and, therefore, as regards the father, though the infant may have a right to claim any benefit the father may receive, yet, if any loss is sustained, I am clearly of opinion that it cannot be thrown upon the infant. Where a man, holding shares in a railway company, voluntarily transfers them to a boy of seventeen or eighteen (as in this case), such  
transfer

transfer does not, in point of fact, make that youth a shareholder in the railway company.

1857.

REID'S CASE.  
*In re The*  
ELECTRIC  
TELEGRAPH  
COMPANY OF  
IRELAND.

I think it unnecessary to consider how far the directors could bind the other shareholders of the company, by accepting the son as a shareholder, with full knowledge of the facts, because, although there is evidence to shew that, at the time of proposing him as a director, the brother said he was a boy, there is no evidence that the company knew that he was an infant at the time of his becoming a shareholder.

I entertain no doubt that the transfer was a mere nullity as regarded the other shareholders, and that the father must remain on the list of contributories.

### MAXWELL'S CASE.

#### *Re The ELECTRIC TELEGRAPH COMPANY OF IRELAND.*

IN August, 1852, Mr. *Maxwell* applied for some shares in this company, for and in the name of his son, who was an infant of six years of age. He paid £20l. deposit on the shares at the bankers, and obtained a receipt entitling him to the share certificates in exchange.

Mr. *Maxwell* offered to execute the deed in the name of his son, but this was refused by the agent of the company.

July 25.

A father applied for shares in a company in the name of his son, and he paid the deposit; the company, however, refused to allow him to execute the deed on behalf of the son. Having done no further act, Held, that the father was not a contributory.

The

1857.  
MAXWELL'S  
Case.  
Re The  
ELECTRIC  
TELEGRAPH  
COMPANY OF  
IRELAND.

The deed was never executed, but the 20*l.* was retained, and nothing had been done in the matter when, in *May*, 1856(a), the company was ordered to be wound up.

Mr. *Cotton* argued that Mr. *Maxwell* was not a contributory.

Mr. *Selwyn*, *contra*, relied on *Reaveley's Case* (b).

*The MASTER of the ROLLS.*

I am clear that these acts do not make Mr. *Maxwell* a contributory. In *Reaveley's Case*, the father had entered into a covenant that his son would pay the instalments and observe all the covenants in the deed. If, in this case, the father had entered into such a covenant, and had executed the deed on behalf of his son, I should have been disposed to think that he had rendered himself liable; but, as the case stands, he proposed something which was rejected by the company, and nothing more was done. He lost his 20*l.*, but he did not become a shareholder. His name ought to be taken off the list of contributories.

(a) 22 *Beav.* 471.

(b) 1 *De G. & Sm.* 550.

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1857.

PAGE v. MAY.

**WILLIAM SLOW**, the elder, bequeathed 1,000*l.* Consols to his widow, *Ann Slow*, for life, and after her death to his son, *William Slow*, absolutely. The testator died in 1795.

*William Slow*, the son, by his will dated in 1801, bequeathed his reversionary interest in the 1,000*l.* Consols unto his mother, *Ann Slow*, for her life, and at her decease he gave and bequeathed the same unto his servant *Sarah Triggs* for life, "and after her decease he gave and bequeathed the said sum of 1,000*l.* unto *John Page*, *Edward Page* and *Samuel Page*, to be equally divided, share and share alike, or in the case of the demise of each or either of them, to be divided between the survivors or survivor, or their representatives." And he thereby appointed his mother, *Ann Slow*, sole executrix and residuary legatee.

*William Slow*, the son, died in 1801; his mother, *Ann Slow*, died in 1819. The three legatees, *John Page*, *Edward Page* and *Samuel Page*, died respectively in 1807, 1813 and 1834, in the lifetime of *Sarah Triggs*, and *Sarah Triggs* died in 1840.

The Plaintiff was the legal personal representative of *John*, *Edward* and *Samuel Page*, and he claimed as against the executor of *Ann Slow*, the 1,000*l.* Consols.

The question argued was, whether by the deaths of *John*, *Edward* and *Samuel*, in the life of the tenant for

July 24, 27. Bequest, after a life estate, to A., B. and C. equally, "or in case of the demise of each or either of them, to be divided between the survivors or survivor, or their representatives." All three died in the life of the tenant for life. Held, that this being an alternative gift, their representatives were entitled to the fund. The case of *M<sup>r</sup> Donald v. Brice* (16 Beav. 581) overruled.



1857.

PAGE  
v.  
MAY.

for life, their representatives took the 1,000*l.*, or whether the gift failed, so that the 1,000*l.* Consols fell into the residue of the estate of *William Slow* the son, and passed to *Ann Slow*.

Mr. *Jessel*, for the Plaintiff. The three brothers took vested interests, which were not afterwards divested by the deaths of all of them in the life of *Sarah Triggs*. The case is governed by *Harrison v. Forman* (a); *Sturges v. Pearson* (b); *Jarman* on Wills (c).

Mr. *Beavan* (in the absence of Mr. *R. Palmer*), for the executor of *Ann Slow*, the residuary legatee of *William Slow*, the son. The 1,000*l.* Consols fell into the residue, and now belongs to the Defendant. The established rule is, that where there is a prior tenancy for life, survivorship amongst legatees is to be referred to the death of the tenant for life, which is the period of distribution. This rule is laid down in *Cripps v. Wolcott* (d), thus:—"But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy." The gift takes effect in favour of those who survive, and of those only, and if none survive, the gift lapses. This was distinctly decided in *M'Donald v. Bryce* (e), where, subject to a prior gift, there was a bequest to seven persons, "and the survivors and survivor of them;" it was held that the survivorship had reference to the death of *Peter*, and the seven persons having all died in the life of *Peter*, the gift failed.

The last survivor was not entitled, because if the intention

(a) 5 *Ves.* 207.(b) 4 *Madd.* 411.

(c) Vol. 1, p. 704 (2nd edit.)

(d) 4 *Madd.* 11, 15.(e) 16 *Beav.* 581. But see*Belk v. Slack*, 1 *Keen*, 238.

**intention** was that the first who died should be excluded **because** he predeceased the tenant for life, that intention **equally** applies to all the others, and to the last survivor, **who** is therefore excluded for the same reason.

1857.

~  
PAGE  
v.  
MAY.

**Mr. Jessel**, in reply. *M'Donald v. Bryce* is not an **authority**: the point was not raised or argued; *Jarman* on Wills (*a*).

**Mr. Beavan**. The parties in that case appealed on **the** very point, but the case was afterwards **compromised**.

*The MASTER of the ROLLS* reserved judgment.

*The MASTER of the ROLLS*.

July 27.

The three legatees having died in the life of the **tenant** for life, the question is, whether this legacy took **effect** or went over. I am of opinion that it falls **within** the case of *Harrison v. Forman* (*b*), and that **class** of cases. It is, in effect, an alternative bequest to them, and if one or two of them happened to die, and two or one of them survived the tenant for life, then the whole would go to the survivors or survivor, as the case might be. But the first bequest to the three was a vested gift, liable to be divested on the happening of a particular event, which did not occur, namely, of there being survivors or a survivor at the death of the tenant for life.

I am of opinion that they took vested interests, and that the Plaintiff, who is the legal personal representative of the three, is entitled.

I principally

(*a*) Vol. 1, p. 705, n. (*r*) (2nd edit.)

(*b*) 5 Ves. 207.

1857.

PAGE  
v.  
MAY.

I principally reserved my judgment to consider the effect of my decision in *M'Donald v. Bryce* (a). I have no note or recollection of that case, and the exact words of the will are not stated in the report of that case. On reading it I cannot, I confess, reconcile it either with principle or with the authorities. I regret it was not carried further, because it is of the greatest importance that nothing should shake settled rules of construction. It is to be observed that it does not appear that the point was raised, though certainly, speaking from my own experience, it rarely occurs that Counsel omit to suggest to the Court any point that can properly be urged in support of their case. There may have been some circumstances that affected the particular matter.

Mr. *R. Palmer*. I remember that Counsel, on that occasion, exhausted their whole strength in attacking the case of *Cripps v. Wolcott*.

*The MASTER of the ROLLS*. Be that as it may, I am of opinion that *M'Donald v. Bryce* cannot govern this case, and that I must hold, in the events which have happened, that the legacy vested in the three legatees, and is now payable to the Plaintiff, as the legal personal representative of those three persons.

(a) 16 *Beav.* 581.

1857.

## BARROW v. WADKIN. (No. 2.)

**B**Y the 13 Geo. 3, c. 21, s. 1, all persons born "out of the legiance of the Crown of *England* or of *Great Britain*," whose fathers are, by the 4 Geo. 2, c. 21, entitled to the rights of natural-born subjects, are hereby declared to be natural-born subjects.

July 22, 28.

The words in the 13 Geo. 3, c. 21, s. 3, are to be read "aliens' duties, customs and impositions," and not "aliens, duties, customs and impositions," and therefore the grandchild of a natural-born subject, born out of the queen's allegiance, is entitled to the benefit of that statute, in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the third section.

The 3rd section provides as follows:—"Provided also, and be it further enacted by the authority aforesaid, That nothing in this present Act contained shall extend, or be construed, adjudged, or taken to repeal, abridge, or anyway alter, an Act made in the fifth year of the reign of his late majesty King *George* the First (a), intituled, *An Act to prevent the Inconvenience arising from seducing Artificers in the Manufactures of Great Britain, into foreign Parts*; nor to repeal, abridge, or anyway alter, any law, statute, custom, or usage whatsoever, now in force, concerning *aliens duties customs and impositions*, nor to cause any privilege, exemption, or abatement, relating thereto, in favour of any person naturalized by virtue of this Act, unless such person shall come into this realm, and there inhabit and reside, and shall take and subscribe the oaths, and make, repeat, and subscribe the declaration appointed by an Act, made in the first year of the reign of his late majesty King *George* the First (b), intituled, *An Act for the further Security of his Majesty's Person and Government, and the Succession of the Crown in the Heirs of the late Princess Sophia*, being

(a) 5 Geo. 1, c. 27.

(b) 1 Geo. 1, st. 2, c. 13.

1857.

BARROW  
v.  
WADKIN.

*being Protestants, and for extinguishing the Hopes of the pretended Prince of Wales, and his open and secret Abettors, in such manner and form and at such place and places, as are in and by the said Act directed, and also receive the sacrament of the Lord's Supper, according to the usage of the Church of England, or in some Protestant or reformed congregation within this Kingdom of Great Britain, within three months before their taking the oaths in the said Act mentioned; and shall, at the time and place of taking and subscribing the said oaths, and of the making, repeating, and subscribing the said declaration, produce a certificate, signed by the person administering the said sacrament, and attested by two credible witnesses, whereof an entry shall be made of record in the Court and Courts respectively, wherein such oaths shall have been taken and subscribed, without any fee or reward."*

The question was, whether, to entitle a grandchild to the benefit of this statute in regard to taking real estate by devise, he must conform to the requirements of the 3rd section of the 13 *Geo. 3*, c. 21.

Mr. *R. Palmer* and Mr. *Little* argued, that the operation of this clause of the statute was limited to fiscal purposes, and that it referred to "aliens' duties," &c., like those mentioned in the 24 *Geo 3*, c. 16, s. 4, and did not affect aliens personally. That the words of the statute, notwithstanding the punctuation in the printed copies, were "aliens' duties," and not aliens, duties, &c.

Mr. *Wickens*, for the Crown, *contra*, argued, that aliens were within the express words of the statute. He cited *Fitch v. Weber (a)*.

*The*

(a) 6 *Hare*, 51.

*The MASTER of the ROLLS* reserved the point.

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1857.

BARROW  
v.  
WADKIN.

July 28.

*The MASTER of the ROLLS.*

There is, certainly, very considerable difficulty in this case, arising from these circumstances which I am about to state. The question depends on whether, in the 3rd clause of the statute of the 13 Geo. 3, c. 21, the word "*aliens*," coming before the word "*duties*," is to be treated as the genitive case; that is, "the duties of *aliens*;" or whether it is to be treated as a distinct and separate word, so that the clause will run thus:—"Aliens, duties, customs, and impositions." The whole question is, whether the persons interested are bound, or ought to be bound, by this clause in the Act.

The first thing to do, is to look at the Act of Parliament itself. I happen to have two editions of the Statutes. The one I have before me is an edition of 1774, the quarto edition, in which it is printed thus:—"Aliens, duties, customs, and impositions;" there being a comma after each of the words *aliens*, *duties* and *customs*: there can be no doubt, that, according to that reading, the *aliens* and *duties* are two distinct separate words, and if so read, the result would be, that nothing in that Act contained is to repeal or alter any law then in force concerning *aliens*, or concerning *duties*, or concerning *customs*, or concerning *impositions*.

In *Raithby's* edition, the comma between *aliens* and *duties* is omitted, but a comma is put on the top of the word *aliens* to mark the genitive case, and there is a comma after "*duty*" and after "*customs*." If so read, it is equally clear, that the statute is to alter no law concerning

1857.



BARROW

v.

WADKIN.

concerning the duties of aliens, concerning customs and concerning impositions.

I supposed I should not learn much on the subject from the inspection of the Roll of Parliament; but, as it was in my custody, I have examined it, and I have before me at this moment the original statute itself, from which the words in the printed copies are taken. It seems that in the Rolls of Parliament the words are never punctuated, and accordingly very little is to be learnt from this document. The words, however, are these:—"Nor to repeal abridge or any wise alter any law statute custom or usage whatsoever now in force concerning aliens duties customs and impositions"—and so on. Counsel can look at this record if they think fit, but I can find no lesser distance between the words in question than there is in any other case. You will see just at the line above the bottom where the two pieces of parchment meet—not to "repeal abridge or anywise alter any law custom usage or statute whatsoever now in force concerning aliens duties:" there would appear, at first sight, to be something like an inverted comma at the top, but it is only the form of writing the letter S.

In this state of things, laying aside the prints altogether, I proceed simply on this document, and treat it as if the Legislature had given no further directions on the subject than what appear from the face of it. I then look for the spirit and object of the Act; and I think that the object of the Act is, that it is not to affect what may be called *taxes*; consequently, that the proper and rational mode of dealing with it is, to adopt the interpretation which Mr. *Raithby* has put upon it, namely, that it refers to the duties of aliens and to customs and impositions, and that it is not a separate and distinctive matter relating to aliens, but refers only to matters relative

lative to the raising of revenue, and fiscal charges on subjects and on aliens.

1857.

BARROW

v.

WADKIN.

That is my view of the case; but at the same time, if a question of title depends upon it, the parties must themselves consider what course it may be fit to adopt. I state the difficulty and my view on the point; it is possible that another person might come to a different conclusion. If the parties take the opinion of a higher tribunal, they will settle the question.

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MARY SMITH, JOHN GREENWOOD, ANN GREENWOOD, JANE HODGSON & SARAH NEVILL v. HORSFALL and Others.

March 26.

July 29.

THE five Plaintiffs, who were legatees and also interested in the real estate, instituted this suit in September, 1855.

One of several co-Plaintiffs was dead at the date of the decree, and the suit had in consequence abated. On motion, the representatives appearing and submitting to be bound, the Court revived the suit, and authorized the surviving Plaintiffs to prosecute the decree.

A decree was made in *January*, 1856; but in *December*, 1855, previously thereto, the Plaintiff *John Greenwood* had died. No notice had been taken of his death, the fact being unknown to the other co-Plaintiffs and the solicitor.

After this, in *July*, 1856, the Plaintiff *Sarah Nevill* died. These facts becoming known during the prosecution of the decree in chambers, the Chief Clerk refused to proceed, on the ground that the decree was irregular.

Mr. *Whitely* applied to the Court. He suggested, that by the 15 & 16 *Vict.* c. 86, one of several legatees could properly represent the rest; so that, in fact, the suit was not now defective, as the rights of the surviving Plaintiffs sufficiently supported the decree.

The



1857.

*The MASTER of the ROLLS.*

SMITH  
and Others  
v.  
HORSPALL  
and Others.

I am satisfied that the suit had abated at the hearing.  
You must get an order to revive and obtain a new decree.

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July 29.

The Plaintiff *Jane Hodgson*, the executor of the deceased Plaintiff *John Greenwood*, and *William Barber Sanderson*, the administrator of the Plaintiff *Sarah Nevill*, having agreed to appear and submit to be bound by the proceedings,

Mr. *Rogers* now moved, that, upon this submission, the suit might be revived ; and that the decree might be carried on and prosecuted by the surviving Plaintiffs against the Defendants and the representative of *John Greenwood* deceased.

The Defendants, though served, did not appear.

*The MASTER of the ROLLS* made the order.

1857.

CLEMENTS v. HALL.

**W**ALTER HALL died in *November*, 1847, and his will was proved by the Defendant *Matilda Hall*. At his death he was engaged in partnership with his brother *Alfred Hall* in working a mine at *Settlingstone*. The mine had originally been held by *Walter Hall*, *Alfred Hall* and *Richard Pullen* (deceased), under a lease for twenty-one years. It expired in 1845, after which time *Walter* and *Alfred Hall* continued to work the mine as tenants from year to year and as partners in equal moieties. After the death of *Walter Hall*, in 1847, *Alfred Hall* continued in possession of the mine, and of the plant and stock therein (valued at 323*l.*), and he worked the mine for his own benefit to such extent as was requisite to keep the mine going. In *September*, 1850, the landlord, being dissatisfied, gave *Alfred Hall* notice to quit at Lady-day, 1851, and the tenancy then expired. However, in the beginning of 1851, *Alfred Hall* made proposals to take a new lease, and an arrangement was come to by which he was allowed to enter into a portion of the mine, he agreeing, instead of a royalty as previously, to pay a fixed rent of 500*l.* a year and a royalty in addition, and to expend more capital and work it with greater vigour than formerly. He accordingly, from Lady-day, 1851, to the time of his death in *December*, 1853, held possession of this portion of the mine, as tenant from year to year, and he proceeded to lay out considerable sums in working it.

May 22, 23.

Mines being a property of a speculative character, it is incumbent on parties setting up claims in respect of them to act speedily. *A.* and *B.* were tenants from year to year of a mine, which they worked in partnership. *A.* died in 1847. *B.* continued to work the mine, and repudiated all claims of *A.*'s executrix to share in the profits, and she took no proceedings to enforce them, and in no way contributed to the expense of working the mine. The landlord gave *B.* notice to quit, and *B.* then entered into new arrangements. *B.* continued the working, and died in 1853. The

On Master of the Rolls held, in

a suit instituted more than six years from *A.*'s death, that his estate was entitled to no portion of the profits except that attributable to the employment of his share of the plant. Lord *Cranworth* and Lord Justice *Turner* were of a different opinion, but Lord Justice *Knight Bruce* was inclined to concur with the Master of the Rolls.

1857.  
CLEMENTS  
v.  
HALL.

On his death, in 1853, the landlord gave his administratrix notice to quit, but an arrangement was come to by which she was allowed to re-enter.

This bill was filed in 1854 by the assignee of *Henry Foley Hall*, an annuitant under the will of *Walter Hall*, against *Matilda Hall*, the legal personal representative of *Walter* and *Alfred*, and its principal object was to establish an interest in favour of *Walter's* estate in the mine.

The executrix, by her answer, stated, that *Alfred Hall* in his lifetime, always insisted that the mine survived to him at the death of his brother, and that he was entitled to the whole profits thereof. That she in no way interposed or in any way assisted, by capital or otherwise, in carrying on the mine, nor did she require *Alfred Hall* to pay or account for the profits. She stated, "that the reasons and motives which induced her to abstain from requiring or compelling any such payment or account were, first, her belief that such mine produced no profits; and next, the contention of *Alfred Hall*, that *Walter's* estate was not entitled to share in such profits, if any."

By the decree made in *July*, 1855, an inquiry was directed as to what interest the testator *Walter Hall* had in the mine, and whether it had determined.

The Chief Clerk found that *Walter Hall's* interest in the mine at *Settlingstone* ceased upon his death, and that the mine then became the property of *Alfred Hall*, subject to his accounting for the testator's capital therein at the time of his death, and the profits produced by the use thereof by *Alfred Hall*.

The

The Plaintiff now moved to discharge the certificate, and "that it might be declared, that the interest of the testator in the mine had not ceased or determined, but was still subsisting."

1857.  
CLEMENTS  
v.  
HALL.

The Plaintiff read in evidence the answer of the executrix to a suit instituted in 1851 by *Henry Foley Hall* (under whom the present Plaintiff claimed), who was entitled to an annuity under the will of *Walter Hall*, against *Alfred Hall* and *Matilda Hall*, the executrix, which sought for the administration of *Walter's* estate, and that the mine in question might be worked under the authority of the Court. *Matilda Hall* in this answer stated, that *Alfred*, who had ever since his brother's death been in possession of the mine, had refused to comply with her repeated applications to render an account of the rents and profits of the mine. All further proceedings in that suit had been stayed by an order upon the Plaintiff to give security for costs.

Mr. R. Palmer and Mr. Kent for the Plaintiff.

Mr. Selwyn and Mr. Karlake for the Defendant.

See *Senhouse v. Christian* (a); *Norway v. Rowe* (b); *Clegg v. Edmonson* (c); *Clegg v. Fishwick* (d); *Pren-dergast v. Turton* (e); *Hart v. Clarke* (f); *Macbryde v. Weekes* (g); *Pollard v. Clayton* (h); *Jennings v. Broughton* (i).

The

(a) 19 Ves. 157 and 19 Beav. 356, n.

(b) 19 Ves. 144.

(c) 22 Beav. 125, and 26 L. J. (Ch.) 673.

(d) 1 Mac. & Gor. 294.

VOL. XXIV.

(e) 1 Y. & C. (C. C.) 98.

(f) 19 Beav. 349, and 6 De G., M. & G. 232.

(g) 22 Beav. 539.

(h) 1 Kay & J. 462.

(i) 17 Beav. 239.

1857.

CLEMENTS

v.

HALL.

May 23.

*The MASTER of the ROLLS.*

In this case a perusal of the affidavits confirms the view which I expressed yesterday, and which was the same as I had before taken of the matter in chambers. In my opinion, no account can properly now be directed of so much of the profits of the working of this mine as are attributable to the leasehold interest which the testator had in the property at the time of his death. It is not disputed, on either side, that a general rule applies to these cases, which is the rule laid down in *Clegg v. Fishwick* (a) and a number of other cases, that upon the death of a testator, his property in a mine, like his property in any other partnership (for it is exactly the same), still continues; and that, if not sold or disposed of between the parties, it would, *prima facie*, be the property of the testator, and if producing a profit, his estate would be entitled to have the benefit of it. But if the testator dies, carrying on a mining partnership with another, as he did in the present case with his brother, as tenants from year to year under a landlord, there is no law which makes it imperative on his legal personal representative to continue to carry on that trade. He is bound undoubtedly, so long as his interest continues, to the original landlord; but there is nothing to compel the legal personal representative to continue in that trade. Neither is there anything to compel the surviving partner to continue to carry it on in partnership.

Then, the only question that arises on the facts of the present case is this:—Whether it is reasonably to be inferred, in this case, that there was, if not an express agreement, an agreement, by assertion on the one side, and by acquiescence or waiver on the other, that the testator's

(a) 1 Mac. &amp; Gor. 294.

Testator's estate should cease to have any further concern or interest in the mine. I find that what took place was this:—The testator died in *November*, 1847, the brother asserted that all the interest in it survived to him. His sister, the legal personal representative, never enforced any account from him, never took any steps to make him account in respect of this mine, but in an answer in a suit filed four years afterwards by *Henry Foley Hall*, the person under whom the present Plaintiff claims, she stated, that she had applied to him for accounts of this and other mines; that he had refused them, and claimed to be entitled to the mine absolutely for his own benefit, and he insisted that he was not carrying on the business either as her agent or as her Partner, unless there was any partnership arising by construction of law.

1857.

CLEMENTS  
v.  
HALL.

In that state of circumstances, I think it would have been totally impossible for the brother to have said, as against the executrix, that the testator's estate was liable in respect of any expenses incurred in carrying on the mine; neither does it appear to me that the present Plaintiff, whom I must treat in exactly the same way as *Henry Foley Hall*, under whom he claims, and who had a charge upon this estate under the will of the testator, can be allowed, after more than six years have elapsed, to say, that this is a case in which this mine must be treated as part of the property of the testator. The legal personal representative has not thought fit to do so, and I think that she and all the persons claiming under her are bound by what has occurred, and that the only question which could arise now would be one between her and her *cestuis que trust* for an account against her for not enforcing the right of the testator to have the mine carried on for their common and joint benefit.

1857.  
CLEMENTS  
v.  
HALL.

It is also to be observed, that, in point of fact, a new letting took place four years after the death of *Walter*, for on Lady-Day, 1851, the Duke of *Northumberland*, the landlord of the mine, gave notice to quit, and a new arrangement was made between him and *Alfred Hall*. The brother of the testator, who is now dead, may, therefore, fairly be assumed to have said, that he would carry on this mine for his own benefit, but that he would not carry it on in partnership with the executrix, and that the executrix has acquiesced in that proceeding, by taking no steps whatever, which she might have done, to enforce any account or a sale during that period. I think, therefore, on the statement of these affidavits, that it must be treated, that the claim made by the brother to carry on the mine on his own account was acquiesced in by the legal personal representative, and that the present Plaintiff is bound by those proceedings. It is especially to be borne in mind that the principle laid down by Lord *Eldon* in *Norway v. Rowe*, viz, that in a case of mines it is the more incumbent on a person to act speedily and diligently, because the value of mines is always a matter of doubt and speculation, and it cannot be open to the legal personal representative of a deceased owner to stand by five or six years and say, if the mine turns out unfavourable I will have nothing to do with it, but if it turns out to be a profitable speculation, I will come in and insist on having an account, and on participating in the profits.

Under these circumstances, I am of opinion, that the conclusion to which I previously came in chambers is a correct one, and that it must be affirmed on the present occasion.

There must be an account directed of how much of the stock and plant belonged to *Walter*, and of the profits

profits produced by it; and so much of the profits as are properly attributable to the use of that capital must be accounted for for the benefit of the *cestuis que trust*, according to the principle established in *Wedderburn v. Wedderburn* (a), and many other cases.

(a) 2 Keen, 722; 4 Myl. & Cr. 41; and 22 Beav. 84.

1857.

CLEMENTS  
v.  
HALL.

On appeal, Lord Cranworth and L. J. Turner disagreed with the conclusion of the Master of the Rolls, but L. J. Knight Bruce stated that "the inclination of his opinion was rather in accordance with the conclusion of the Master of the Rolls than otherwise." Feb. 25, 1858.

# WILLIAMS v. The ST. GEORGE'S HARBOUR COMPANY.

**I**N 1853, an application was made to Parliament to incorporate a company and enable it to construct a harbour at *Llandudno* Bay, and a branch railway therefrom to the main line of the *Chester and Holyhead* Railway.

The Plaintiff, the owner of lands adjoining the proposed railway, opposed the bill, insisting that it would prejudice and depreciate his property. Ultimately, the Plaintiff consented to withdraw his opposition upon the terms set forth in a written agreement, which was as follows:—

"Memorandum, the 23rd of *July*, 1853. On Colonel *Williams*' (the Plaintiff) withdrawing his opposition to the *St. George's* Harbour Railway Bill, it is agreed by Mr. *Motte*, on behalf of himself and the other promoters:—First, that Colonel *Williams*' cost of opposition,

*June* 23, 24.

An agreement entered into between a landowner and the promoters of a bill in Parliament to authorize the construction of a railway, held, not binding on the company after its incorporation, the Company having done no act to adopt it.

Whether an agreement to buy off the opposition of a landowner to a railway bill before Parliament can be supported, *quere*.



1857.  
  
 WILLIAMS  
 v.  
 The  
 ST. GEORGE'S  
 HARBOUR  
 COMPANY.

sition, as between solicitor and client, shall at once be paid by the promoters. That within one month after the passing of the Act, a sum of 250*l.*, and before any ground of Colonel *Williams'* is taken, and before the formation of the said railway is commenced, a further sum of 1,750*l.* shall be paid to him, as for ascertained consequential damages to his *Marle* Estate. That the payment of such land as is taken, or severance of the estate effected, shall, in addition, be assessed as under the Railway Act and paid for," &c. &c.

This agreement was signed by the Plaintiff's agent and by Mr. *Motte*, the chairman of the proposed company.

The Plaintiff's opposition was withdrawn and the bill passed, incorporating the company and giving the necessary powers for the construction of the works.


The Plaintiff brought an action against the company for 250*l.*, which he abandoned; he afterwards brought an action against Mr. *Motte*, when the solicitors of the company consented to a Judge's order against the company for the 250*l.* and for 122*l.*, the costs of the opposition.

The company having commenced making their line without paying the Plaintiff the further sum of 1,750*l.*, he instituted the present suit against the company, praying, first, a decree for payment of the 1,750*l.*, and for the specific performance of the agreement; and, secondly, that until payment the Defendants might be restrained from proceeding with the formation of their railway.

A motion was now made for the injunction.

Mr.

Mr. *R. Palmer* and Mr. *G. O. Morgan*, for the Plaintiff, argued, that the company having taken the benefit of the contract entered into on its behalf, prior to the Act, was bound to perform their part of it; *Edwards v. The Grand Junction Railway Company* (a); Lord *Petre v. The Eastern Counties Railway Company* (b); *Stanley v. The Chester and Birkenhead Railway Company* (c). That the present case was distinguishable from the modern authorities, in which it had been held, that a corporation was not bound by contracts prior to its incorporation; for in those cases the railways had been abandoned, while, in the present case, the company was proceeding in the construction of the works, and had adopted the agreement and taken the benefit of it.

1857.  
  
 WILLIAMS  
 v.  
 The  
 ST. GEORGE'S  
 HARBOUR  
 COMPANY.

*The MASTER of the ROLLS.*—All that I should order would be to pay the money into Court.

Mr. *Selwyn* and Mr. *Hetherington*, *contra*, argued, first, that the agreement was not binding on the company, on the authority of the modern decisions in the House of Lords, which had reversed the doctrine laid down and acted upon by Lord *Cottenham*; *Preston v. The Liverpool, &c. Railway Company* (d); *Eastern Counties Railway Company v. Hawkes* (e); *The Caledonian, &c. Railway Company v. The Magistrates of Helensburgh* (f). Secondly, that the Court would not enforce such an agreement as the present on an interlocutory application; *Cromford, &c. Railway v. The Stockport, &c. Railway* (g). Thirdly, that on the construction of the agreement, the time had not yet arrived for

(a) 1 *Myl. & Cr.* 650.  
 (b) 1 *Railw. Cas.* 462.  
 (c) 3 *Myl. & Cr.* 773.  
 (d) 5 *H. L. Cas.* 605.

(e) 5 *H. L. Cas.* 356.  
 (f) 2 *Macqueen*, 391.  
 (g) 24 *Beav.* 74 (reversed).

1857.  
  
 WILLIAMS  
 v.  
 The  
 ST. GEORGE'S  
 HARBOUR  
 COMPANY.

for payment of the money. Fourthly, that the contract was illegal and *ultra vires*; and lastly, that the proper remedy was by action at law.

Mr. *R. Palmer*, in reply, said, that although doubts had been thrown on the doctrine of Lord *Cottenham*, that a corporation was bound by the contracts of its projectors, prior to its incorporation, still that this was limited to such contracts as would be *ultra vires* and void, if entered into after its incorporation.

The following cases were also referred to during the argument: *Preston v. The Litterpool, &c. Railway Company* (a); *Webb v. The Direct London and Portsmouth Railway Company* (b); *Wilkes v. Hungerford Market Company* (c); *The Queen v. The Eastern Counties Railway Company* (d); *Goody v. The Colchester Railway Company* (e); *Gage v. The Newmarket Railway Company* (f); *Hawkes v. The Eastern Counties Railway Company* (g); *Coole v. Barham* (h).

*The MASTER of the ROLLS.*—I will give judgment tomorrow.

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*The MASTER of the ROLLS.*

June 24. Upon reading over these papers, I am of opinion that this case is not distinguishable from the decision which I myself came to in *Goody v. The Colchester Railway*

(a) 17 *Beav.* 114, and 5 *H. L. Cas.* 605.

(b) 1 *De G., M. & G.* 521.

(c) 2 *Bing. N. C.* 281.

(d) 2 *Q. B.* 347.

(e) 17 *Beav.* 132.

(f) 18 *Q. B.* 457.

(g) 1 *De G., M. & G.* 737, and 5 *H. L. Cas.* 331.

(h) 3 *Exch.* 183.

**Railway Company (a)**, and that there is nothing in this agreement to bind the company and to make it obligatory upon them to perform that which the Plaintiff requires.

1857.

WILLIAMS  
v.  
The  
ST. GEORGE'S  
HARBOUR  
COMPANY.

In the first place, the agreement is not under the seal of the company; it could not be, because the company did not exist at the time, and without going to the extent of the observations that were made by their Lordships, in the various cases that have been appealed to the House of Lords upon this subject, though I am bound to say that I fully concur in them, and admitting the authority of the decision of Lord *Cottenham* in the case of *Edwards v. The Grand Junction Railway Company (b)*, and *Stanley v. The Chester and Birkenhead Railway Company (c)*, yet there is nothing here which, in my opinion, can bind the company. Here is an agreement made by a landowner to abandon his opposition to a bill in Parliament, and take a certain sum of money, independent and distinct from the price of the land taken and the consequential damage attendant on its being taken, in case the bill passed. It is signed by the chairman of the company; there has been some dispute about it, but I hold the fact to be established upon the evidence as in *Goody v. The Colchester Railway Company (d)*, where the agreement was signed by the solicitor. The question in both cases is, whether those persons were the agents of the company. That they considered they were acting on behalf of the company, or rather on behalf of the promoters of the company, and for the purposes and object of the company, I do not doubt; but unless the company afterwards adopted the arrangement, and sanctioned

(a) 17 *Beav.* 132.(b) 1 *Myl. & Cr.* 650.(c) 3 *Myl. & Cr.* 773.(d) 17 *Beav.* 132.

1857.

WILLIAMS

v.

The

ST. GEORGE'S  
HARBOUR  
COMPANY.

sanctioned it, it amounts to nothing, unless some clause were introduced into the Act, which is the proper mode of carrying into effect arrangements of this character between private individuals and the promoters of joint stock companies, and which would remove all the objections which were so forcibly put by the Lord Chancellor, as to the manner in which the public are deceived into purchasing shares in a company, the obligations of which they are totally unable to ascertain from the Act of Parliament, which is their only title. If I look for any clause in any Act to ratify this purchase, I find none at all. The only thing that has taken place is, that the Plaintiff brought an action against the company which has been abandoned. He has brought an action against Mr. *Motte*, who signed the paper, and that action has been successful, that is to say, the company consented to a Judge's order to pay the 250*l*. I cannot hold that to be any adoption of the agreement. The action was brought against the company and abandoned, and another action was brought against Mr. *Motte*, and then the company said they would pay it, not because they were liable upon the agreement, for an action could not be maintained against them on it, as appears by the action having been abandoned, but because the company thought themselves bound to pay Mr. *Motte's* debt.

I express no opinion as to whether Mr. *Motte* would be personally liable to the Plaintiff upon this agreement; but without going further than the case of *Gooday v. The Colchester Railway Company*, which appears to me to govern this case, and to be exactly analogous to it, I am of opinion that there is nothing whatever to bind the company in this case, and I cannot make any order.

I forbear

I forbear to say anything as to the validity of the agreement itself, because the ground upon which I proceed is sufficient for the determination of the case. There is evidence both ways as to what the intentions of the parties were when they entered into the agreement; I do not mean to express any opinion whether such evidence is admissible or not, for the purpose of controlling the construction of the agreement. But it is obvious that a very grave question will arise, upon the face of the agreement, whether it is anything more than giving a sum of money for abandoning the opposition to a bill in Parliament, and if so, it would be very difficult, after what was said in the cases in the House of Lords, to support such an agreement. I should have thought it necessary to have gone more fully into it, if I had thought that the company had done any act to bind them, either at the time of the agreement or subsequent to it; but I am of opinion that they have not.

1857.

WILLIAMS  
v.  
The  
ST. GEORGE'S  
HARBOUR  
COMPANY.

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**NOTE.**—Upon appeal to the Lords Justices, the injunction was refused on the ground of the delay in appealing (24th Feb. 1858); but subsequently at the hearing of the cause before them (29th May, 1858), they were of opinion, on the evidence, that the company had adopted the contract, and had therefore made themselves liable.

1857.

July 8, 9, 10,  
20.

## STAINTON v. CARRON COMPANY.

A large shareholder was the manager of the affairs of a company. He rendered accounts regularly from 1826 to his death in 1851. These accounts were not challenged in his life, but after his death items exceeding 2,000*l.* a year were questioned by the company, for which no vouchers could be produced, and no satisfactory explanation given. The account was opened for the whole period of twenty-five years, and it was directed to be taken with special directions.

Observations as to the necessity of an agent preserving his vouchers.

Distinction between the cases where the business of a company is conducted by a mere agent, and where it is managed by a shareholder, who is a *quasi* co-partner.

Special decree for taking a general account, with a direction to treat the books as conclusive, except as to items challenged within six weeks, with liberty to surcharge and falsify.

THE *Carron* Company was established for manufacturing iron from the ore, and for making various articles therewith for sale. It was incorporated by a charter of King *George* the Third, dated the 15th day of *July*, 1773.

The principal works of the company for their manufacturing purposes were situate at *Carron*, near *Falkirk*, in the county of *Stirling*, in *Scotland*, and the company had branch establishments at *Glasgow* and *Leith* in *Scotland*, and also at *Liverpool* and *London* in *England*; but the largest and most profitable portion of the trading business and of the sales of the company was transacted in *London*.

The constitution and business of the company were regulated by the provisions of the charter, and by two several deeds of co-partnership, referred to in the charter, and dated in 1760 and 1771. The constitution of the company provided (amongst other things), that in case any one of the co-partners should become a debtor to the company, his share should be subject and liable for the debt, preferable to every creditor, heir or representative, and in case he should refuse to pay such debt within twelve months after he should be required to

to do so, then he should *ipso facto* forfeit his share. The company were, however, to have the option of holding the forfeited shares at their valuation in the company's books, and after repaying the amount due, they were to hand over the residue, or they might sell the shares, and pay themselves the debt out of the produce.

1857.

STANTON  
v.  
The  
CARRON  
COMPANY.

The charter also provided, that an annual account or statement of the whole affairs, funds, debts and credits of the corporation should, in every year thereafter, be stated and made up to and upon the 1st day of *January*; and the deed of 1771 provided, that there should be proper and regular books kept of the company's whole transactions and management, under the immediate charge and direction of the partner or person to whom the conduct of the company's affairs should be intrusted for the time being, and that these books should be brought to a balance at least once in every year, and that the general meeting in *October* should examine and inspect the whole books and management of the year preceding.

*Dawson* was the manager of the company's affairs at *Carron*.

*Henry Stainton*, who held 101 out of the 600 shares of the company, was, from 1808 to the time of his death, in *December*, 1851, their manager in *London*.

*Henry Stainton* continued down to his death entitled to the 101 shares, which were valued at 80,000*l*. After his death, the Plaintiffs, his executors, requested the company to transfer such shares to them, and to pay them the dividends and the balance due to the testator on his private account. The company refused to do so, alleging that *Henry Stainton* was, at his death, a debtor to them in the principal sum of 69,617*l*. 1*s*. 6*d*. for moneys



1857.  
  
 STAINTON  
 v.  
 The  
 CARRON  
 COMPANY.

moneys retained by him beyond his salary, and for 38,623*l.* 4*s.* 9½*d.* for interest thereon. The company claimed to hold his shares as a security for the alleged debt, which debt arose out of the following circumstances :—From 1808 until 1826 *Henry Stainton* was remunerated for his services by a commission of 5*l.* per cent. on all ready-money sales effected by him, and on cash collected by him on open accounts, with certain additional allowances ; but, on the 10th of *May*, 1826, the company resolved, that he should be remunerated by a salary of 2,000*l.* a year, with a dwelling-house rent free, and an allowance for coals, candles and taxes.

The testator regularly forwarded his accounts to Mr. *Dawson*, the manager at *Carron*, which were not objected to, but after the testator's death the company caused his books and accounts to be examined, when, from 1826, items charged against the company by the testator were discovered, amounting in the aggregate to between 2,000*l.* and 3,000*l.* a year, which they alleged to be overcharges. They consisted of petty disbursements for postage, booking parcels, porters, day labourers, weekly servants, tolls and other small payments, which were charged in the books under different heads and as "sundry charges." For these the testator did not discharge himself, and though the Court pronounced him to be "a methodical person and a good man of business, keeping most careful accounts and scrupulously preserving all his vouchers, duly arranged, even for the smallest payments," (a) still no vouchers could be produced for the items, the accuracy of which was thus challenged.

The Plaintiffs, his executors, insisted that the testator had regularly kept and made out his accounts, which  
 were

(a) See *post*, p. 352.

were always open for inspection, and were delivered monthly to the manager at *Carron*, and were examined and approved by Mr. *Dawson*, and were regularly examined, allowed and settled every month, by the monthly committee of management, and every half-year by the general court of the company. They insisted that the accounts so settled were binding on the company and conclusive against their claims, and they relied on the Statute of Limitations.

1857.  
STANTON  
v.  
The  
CARRON  
COMPANY.

These disputes between the parties had already given rise to considerable litigation here, and the company had also proceeded against the executors in *Scotland*, to compel payment of their claim. See *Maclaren v. Stainton (a)*; *Stainton v. The Carron Company (b)*.

A decree was made in *May*, 1852, in *Maclaren v. Stainton*, to administer the estate of the testator, and the claim of the company having prevented that administration, this bill was filed by the executors against the company, praying that the *Carron Company* might be decreed to transfer the shares, and to account for what was due in respect of them and of the private account, and for payment.

The *Carron Company* resisted this claim on the grounds before stated.

Mr. *R. Palmer*, Mr. *Selwyn* and Mr. *Kenyon*, for the Plaintiffs, insisted on the settled accounts, and argued, on the question of international law, that the rights of the parties ought to be regulated by the *English* law.

They

(a) 16 *Beav.* 279, reversed 5 *H. L. Cas.* 416. (b) 18 *Beav.* 146, and 21 *Beav.* 152, 500.

1857.  
  
 STAINTON  
 v.  
 The  
 CARRON  
 COMPANY.

They cited *Story*, Conflict of Laws (a); *Currie v. Rothschild* (b); *Pattison v. Mills* (c); *Don v. Lippmann* (d); *Willis v. Jernegan* (e); *Tickel v. Short* (f).

Mr. Rolt, Mr. Follett, Mr. Lewin and Mr. Cotton, for the Defendants, insisted that there were no settled accounts binding on the company; that errors were proved, which entitled the company to have all the accounts taken from 1826, and that the rights of the parties were to be governed by the law of *Scotland*, under which the company were entitled to interest on the balances from time to time retained in the hands of *Stainton*. They cited *Earl of Hardwicke v. Vernon* (g); *Reimers v. Druce* (h); *Beaumont v. Boulton* (i); *Clarke v. Tipping* (k); *Allfrey v. Allfrey* (l).

Mr. R. Palmer, in reply.

The MASTER of the ROLLS reserved his judgment.

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The MASTER of the ROLLS.

July 20. In this case I entertain no doubt of the propriety of opening the account between the estate of the testator and the Carron Company. Except on the point of time, with which I shall deal presently, no question could arise upon the subject.

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| (a) <i>Pl.</i> 282, page 378.          | (g) 14 <i>Ves.</i> 504.                    |
| (b) 1 <i>Q. B.</i> 43.                 | (h) 23 <i>Beav.</i> 145.                   |
| (c) 1 <i>Dow. &amp; Cl.</i> 342, and 2 | (i) 5 <i>Ves.</i> 484.                     |
| <i>Bli. N. S.</i> 519.                 | (k) 9 <i>Beav.</i> 284.                    |
| (d) 5 <i>Cl. &amp; F.</i> 1.           | (l) 10 <i>Beav.</i> 353, and 1 <i>Mec.</i> |
| (e) 2 <i>Atk.</i> 252.                 | & <i>Gor.</i> 87.                          |
| (f) 2 <i>Ves. sen.</i> 239.            |  |

The testator was a partner in the company; he was the manager of the business of the company and their agent in *London*, and his time was entirely devoted to its affairs. Then this, in fact, is nothing more than the ordinary case of a partnership, carrying on business in one country, sending one of the members of the firm, as the agent of that firm, into another country, in order to conduct any business which they may have to transact in that other country.

1857.  
STANTON  
v.  
The  
CARBON  
COMPANY.

I shall first consider how this case would stand if the testator were now alive and a Defendant to this cause, and then consider how it is affected and varied by reason of the testator being dead before any proceedings were instituted or any claim made.

In the first place, how would the matter stand, if the testator were now alive. His accounts are here produced; they shew that he annually received sums, varying from 2,000*l.* to 3,000*l.*, for and on behalf of the company, from which he does not discharge himself; he produces no vouchers and gives no explanation of them. If this were all, the account, in such a case, would be a mere matter of course, and he would be charged with these items, but in taking the account he would be at liberty to discharge himself as he could; and he would undoubtedly be entitled to all just and proper allowances.

However, he is now dead, and his representatives (who are also persons who are beneficially interested in his estate) are justly entitled to say, that they are placed in a much worse situation than if the claim had been made in the testator's life; that no claim was made until this gentleman died, and that if it had been, he might, from his knowledge of the business, have been enabled to

1857.  
STAINTON  
v.  
The  
CARRON  
COMPANY.

give explanations impossible for them to give, that they are therefore justly entitled not only to every favourable explanation which can be suggested, consistent with the course of dealing between the parties, but also to the most liberal construction which can be put on these transactions. I concur in these remarks, subject however to what I am about to say when I have to consider the explanations offered.

In the first place, I shall state what appears upon the face of the books and accounts themselves. The testator was evidently a methodical person, and a good man of business, keeping most careful accounts and scrupulously preserving all his vouchers, duly arranged, even for the smallest payments. For the items in respect of which the account is sought to be opened no vouchers appear. This is, in my opinion, highly unfavourable to the testator. It is not pretended that any vouchers have been lost or destroyed, and I must say that it appears to be proved, that there never were any vouchers, as far as a negative can be proved in a matter of this description.

I do not think it necessary to detail the principles which govern cases of agency. I stated my view of the law on this subject in *Haig v. Gray* (a). There certainly is a very considerable distinction in various respects, between this case and *Haig v. Gray*, but it is obvious that it was the duty of this gentleman carefully to preserve vouchers and evidence of all payments he made, and of all sums he received. As applicable to this point, I will read the concluding passage of my judgment in *Haig v. Gray*, "I cannot conclude this case without expressing my regret that I have felt it  
my

(a) 20 *Beav.* 219.

1857.  
STAINTON  
v.  
The  
CARRON  
COMPANY.

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my

(a) 20 *Beav.* 219.

my duty to make a decision, on these points, which will lead me to so stringent a decree against Mr. Gray. It cannot, however, be too generally known or understood amongst all persons dealing with each other in the character of principal and agent, how severely this Court deals with any irregularities on the part of the agent, how strictly it requires that he who is the trusted shall act, in all matters relating to such agency, for the benefit of his principal, and how imperative it is upon him to preserve a correct account of all his dealings and transactions in this respect, and that the loss, and still more the destruction of such evidence by the agent, fall most heavily on himself." Those observations apply to this case, with this exception, which constitutes a great distinction between the case of *Haig v. Gray* and the present. In that case, I was of opinion, as the Master was, that there had been a wilful destruction of evidence, of which there is not the slightest suspicion in the present. But the necessity of keeping correct accounts and of shewing how the money had been applied, and what money had been received, strictly applies to this case, and was fully felt by the testator. I am of opinion that all the accounts kept by him are in evidence, and that consequently no accounts were kept of these particular items, and that considerable sums were received for which no discharge appears on the face of the accounts. Having stated what appears on the accounts, that alone, in my opinion, would be sufficient to open the account, although his representatives would, in taking the account, as I have already said, be entitled to all just allowances.

However, this is proper to be observed, that if the just allowances could now be shewn to exceed the amount of moneys for which no discharge appears in the accounts together with the amount of unvouched

1857.

STANTON  
v.  
The  
CARRON  
COMPANY.

1857.

STANTON  
v.  
The  
CARRON  
COMPANY.

items, it might be doubtful whether the Court would open the account.

This brings me to an examination of the explanations which have been offered as to these unvouched items. Now, subject to some considerations with respect to the peculiar character filled by the testator with regard to this company, which I shall observe on presently, the explanations, given with such care and attention as the representatives of the testator and the Counsel can give to this subject, and which, as I have already stated, I think are to be treated in the most liberal point of view, appeared at the hearing to me to be highly unsatisfactory: and further reflection, consideration and examination of the papers, make them appear to me still more unsatisfactory. The more I consider and examine them, the less is there to satisfy the mind of the Court, that any reasonable explanations can be given of the amount of these items.

In the first place, as to the remuneration of the testator, in my opinion, no question arises in the present case. When this case was first opened to me, I imagined that the questions might be, whether the testator was to be allowed commission on the sales, or simply a salary for his services, and that this might explain the whole matter. I for some time entertained that view of the case, which, as far as it went, was very favourable to the Plaintiffs. However, Mr. *Palmer* pointed out to me that he did not rest his case upon that, and I think very wisely, because upon an examination of the evidence it is, in my opinion, proved beyond all contest, that the testator understood that his salary was to be 2,000*l.* a year after *May*, 1826, and nothing more than the 2,000*l.* a year, with the exception of the allowance of coals and candles, and the house-  
rent



rent free. Now the unvouched items for portorage, &c., to the amount which I have stated, of from 2,000*l.* to 3,000*l.* a year (I have not verified the facts from the books, but it was so stated and was not denied), are in addition to the salary of 2,000*l.* a year. It cannot be suggested that it was the commission that went to make up these items of portorage, because he did not understand he was to have commission; on the contrary, he distinctly understood he was only to have a salary, and it does not satisfy the amount. It is clear that there was very great reluctance on his part to accede to the fixed salary; I think it unnecessary to go into the details of the evidence and correspondence on this subject, but it is clearly established that he was contending for a larger salary. He knew that the company were about to fix the salary, and by reason of the view taken by the Lord Chief Commissioner *Adams* and others, he was obliged, although very reluctantly, to submit to take the salary.

1857.

STANTON  
v.  
The  
CARRON  
COMPANY.

Then what is there to explain the unvouched excess of from 2,000*l.* to 3,000*l.* a year, annually deducted, over and above the salary? In my opinion, there is literally nothing. It is true, that the ingenuity of Counsel has suggested a good many things, but they are wholly unsatisfactory, and bear no comparison with the amount, but even those which are so suggested on the present evidence would not, in my opinion, be allowable under the head of just allowance.

First. As regards the expenses at *Woolwich*, they are only charged down to 1825, and as far as I can make out from the accounts, they never exceeded 600*l.* a year in any year, and as far as I can make out also from the evidence, the business at *Woolwich* was suspended for

1857.  
STAINTON  
v.  
The  
CARRON  
COMPANY.

for two or three years after that time, and, therefore, they would be inadmissible to explain the unvouched items of so large an amount as I have stated.

Secondly. The only other explanation that is suggested is from some casual expenses, for travelling and journeys down to *Carron*, and the like. That also is but small, and quite insufficient to account for the amount in question. In addition to which these expenses, small as they are, would not be allowed him in his character of mere agent, although they might be allowed him if the account were taken against him in a character to which I shall presently advert. An agent who returns to his principal for his own convenience, and of his own free will, would not be allowed the expenses, and there is no evidence that the *Carron* Company required his attendance at the general meetings, the evidence is rather the other way. Besides this, no charge is made for such journeys, although it ought to have been, if admissible, and the accounts are settled without any entry for them being made.

However, all that can be said upon this is a suggestion that I should treat the matter as liberally as possible, and attend to anything that can be suggested from any person who knew the course of life and habits of the testator, and to anything that appears in his private journals or diary, suggesting a right to anything in the shape of just allowances. Although the difficulty arises from the testator himself not having kept proper accounts of this matter, still I should be disposed to deal liberally with his representatives in taking the accounts between the present parties. But, after making every possible allowance, the result is, that there is a very large sum of money received by the testator in every

every year, which is neither vouched or accounted for by him, and nothing appears in the accounts relative to it, except what is tolerably clear, that it was applied to his own use, and in augmenting his own fortune.

1857.  
  
 STAINTON  
 v.  
 The  
 CARRON  
 COMPANY.

Then what answer is to be given to this? It is said that this is to be treated as a settled account, duly rendered and passed. Have the accounts been stated to the Carron Company and allowed by them? if so, it might well alter the case: if they had been cognizant of the fact during a considerable number of years, and had not thought fit to question it till after his death, it would be very doubtful whether this Court would think it proper to go into the questions at all after that lapse of time, and open it after his death. But in the present case the circumstances are these:—In every half-year the testator sent accounts to the manager of the Carron Company, a gentleman who is proved to have acted in all respects as to those accounts as the testator directed. Accounts generally were laid before the company at their general yearly meetings, but there was nothing stated in them which could expose the particular fact now brought to light.

This brings me to consider what the peculiar character of the testator was towards the company. In the first place, this was not a mere case of agency; usually an agent is the servant of partners, but that was not his character here; the testator was a member of the partnership. He was one of the partners carrying on the business of the partnership in London, for the benefit of the partners, at a salary, and practically the testator and the manager at Carron together filled towards the Carron Company the same species of character which  
 directors

1857.  
STAINTON  
v.  
The  
CARRON  
COMPANY.

directors of a railway company do towards the ordinary shareholders. From the evidence, it appears that they regulated the affairs of the company, they conducted the business as they pleased, they rendered such accounts as they liked, subject to having questions asked at general meetings which they might have to answer: in fact, except from the number of the shareholders and the different nature of the business which they were conducting, the managers of this *Carron Company* possessed as nearly as possible the character of a board of directors of a railway company. There is this exception, which does not tell materially one way or the other, namely, that the testator and his family, as he seems to have stated, and on which he appears to have relied, had such a preponderance of votes in the concern, that it would have been extremely difficult, if it had been their desire so to do, for any of the shareholders of the company to have removed these gentlemen from being directors or managers, and put other persons in their places. However, no such intention existed, and this case, therefore, is to be regarded as the case of a company where there having been a change made in the direction, an investigation into the conduct and account of the late managers is insisted upon. In fact, when I came to consider the case, and to read over the evidence in private, to ascertain the position in which the testator stood towards the company, I was reminded, in many respects of the view I took of the case of *The York and North Midland Railway Company v. Hudson (a)*, to which I think it, in many respects, bears a strong resemblance, not at all in the facts, but with respect to the principle on which a person so situated is bound to account.

There

(a) 18 *Beav.* 70.

There are some facts in this case, which are peculiar and important. The correspondence which is in evidence teems with observations shewing the alarm which the testator felt at the possibility of any one of the partners inspecting or sending anybody to inspect the books. He takes Counsel's opinion on the subject; he is prepared to resist it by the utmost possible efforts, and he says that nothing short of a decision of the House of Lords will induce him to permit any shareholder of the company to examine any of the accounts he is keeping. The testator, therefore, was not only in the position of a director, giving, merely such information as he pleased to the company, but he was also in a situation in which he contended that the company had no right to any more information than such as he, or as he and Mr. *Dawson* together, thought fit to give them, and he was also prepared to resist any claim to further information by every species of legal obstacle. In that state of circumstances, Messrs. *Todd* and *Romaine*, the persons contending for and wishing such investigation, very wisely, upon the evidence which they had, abstained from further molestation. Some slight increase was made to the dividend, the company was shown to be prosperous and to be increasing in prosperity, and the testator held out to them the evil consequences of dissension, and the probability of a rival company being created by a public disclosure of their affairs. In that state of circumstances, it is not too much to say, that they, being wholly ignorant of what the state of the facts was, acted wisely in forbearing to press the matter. Is it possible, in that state of things, to say that the accounts sent to Mr. *Dawson* at *Carron* can be treated as accounts acquiesced in and approved by the company? Is it possible that Mr. *Dawson*, the manager at *Carron*, can be treated as the company, or that

1857.

STAINTON  
v.  
The  
CARRON  
COMPANY.

1857.  
STANTON  
v.  
The  
CARRON  
COMPANY.

that he can be allowed, by his acquiescence, to have bound the excluded shareholders, who were kept at arm's length, and who were allowed to know nothing but what the testator had permitted? It appears to me to be totally impossible to take any such view of the case. It would be far less startling to my mind to hear it said, that Mr. *Dawson* might be treated as a director, whose duty it was to have investigated these matters more fully, and that he might be made personally liable to the company for what, if anything, in taking the accounts, should be found due from the testator, and should not be obtained from his estate; but to treat him or his silence on the subject as binding on the company, some of the shareholders of which were endeavouring to see the accounts and were carefully excluded, and none of whom saw anything more than what they were permitted to see by the accounting party, seems to me to be impossible.

I forbear from referring in detail to the various observations in the letters of the testator which establish these facts, such as where he says, "You must give them just what is sufficient; do what is sufficient to satisfy, and avoid details, and no more." The letters are full of observations of that description.

In my opinion, accounts so sent and received by Mr. *Dawson* do not affect the right of the Defendants, the *Carron* Company, and no question of time or of settled accounts really affects this question; if in the decree, which I am about to suggest, I propose to treat the account as settled to a considerable extent, it is only to avoid the expense and delay that would be occasioned by taking the account from the very beginning, which might possibly be found to be an instrument of delay and expense,

expense, and prevent the final adjustment of this matter, which I am desirous to avoid. My intention is to have all these items thoroughly inquired into, to charge the testator with the receipt of the sums appearing in the books to have been received by him, and then to allow his representatives to discharge his estate in the best manner they can, but making them all just allowances that are proved.

1857.

STANTON  
v.  
The  
CARRON  
COMPANY.

This being my object, I will remodel the terms of my decree, as may be suggested by Counsel, as may be best calculated to arrive at that result; in the meantime my opinion is, that it would be best accomplished by a decree to this effect:—Take an account of the dealings and transactions of the testator on behalf of the Carron Company, from the 30th of *January* in the year 1825, until his decease (I give it at no earlier period because, in point of fact, that is the time when the change in the accounts began to take place), and in taking such accounts, the books of the deceased are to be admitted as evidence for both sides, and are to be treated as conclusive between both parties, except to the extent hereinafter mentioned. Then the Defendants, the Carron Company, are, within six weeks from the date of the decree, to deliver to the Plaintiffs a list of such items appearing in the books as they desire to have vouched or accounted for, and thereupon an account is to be taken of such items, and in taking such account all just allowances are to be made to the testator. In all other respects, the accounts appearing in the testator's books are to be treated as settled accounts, but with liberty to the Plaintiffs and Defendants respectively to surcharge and falsify, as they may be advised.

In addition to this, I think it proper to direct, that  
if

1857.

STAINTON  
v.  
The  
CARROW  
COMPANY.

## CASES IN CHANCERY.

if any balances appear to be due from the testator in taking such account at the end of each year, the same are to be stated, in order that this Court may deal with them when the case shall come back again for further consideration. I express no opinion as to the law of which country is to be considered as governing the mode of taking these accounts; that will be a proper subject of consideration when it comes before me at chambers, when particular questions may be raised with respect to the accounts themselves; but I think it proper to make this observation:—that it will be difficult to persuade me, if, in the result of the accounts, it shall appear that considerable balances have been annually retained by the testator, not merely as agent, but in a great measure in the character of a director and trustee, it would, I think, be difficult to persuade me, that his estate can avoid accounting for interest on sums which would have been paid to shareholders, or would have borne interest for the company in his hands, if he had kept his accounts in the open and proper manner he ought to have done, and communicated them to the shareholders, as it was his duty to do; and if it shall appear also, that these sums belonging to the company while in his hands produced interest or profit for himself. I think it better to state this at once, because, although the question does not now arise, it is much better for all parties that they should understand the light in which I look at this account, and the mode in which I shall probably adjust it when it comes before me at chambers, in order that the parties may at once take such course as they may think fit.

Having expressed my view of this case, I am desirous that Counsel should take some little time to consider the terms of the decree, and I shall be willing to



any suggestion they may make as to any alteration in the form of it, which will best work out my object. I think this the more necessary because my decree has this peculiar effect:—That in a great measure it inverts the position of the parties; it turns Plaintiff into Defendant and the Defendant into Plaintiff, and I think it necessary from that circumstance to give this warning to the parties, that if this decree is not prosecuted by the Plaintiffs, which it is very possible, after what I have stated, they may not think it desirable to do (and I cannot compel a party to prosecute a decree), and if in that case the Defendant shall not think fit to prosecute the decree until after the proceedings now pending have been concluded in *Scotland*, I shall, as far as I am able, throw every impediment in the way of their proceeding with the decree at all. I think it highly objectionable that a decree should be kept hanging over the heads of persons, and I will do everything I can to prevent it.

1857.

STAINTON  
v.  
The  
CARRON  
COMPANY.

DECREE.

His Honor doth order and decree, that an account be taken of the dealings and transactions of *Henry Stainton*, the testator in the pleadings named, on behalf of and with the Defendants *Carron Company*, from the 30th day of *June*, 1825, down to the time of his death, and in taking such account, the books kept by *Henry Stainton*, and proved in this cause, are to be admitted as evidence for both sides. And it is ordered that the Defendants *Carron Company* do, within six weeks from the date of this decree, deliver to the Plaintiffs a list of such items appearing in the books kept by the testator as agent of the company in *London*, as they desire to have vouched or accounted for. And in taking the account hereby directed, the Plaintiffs, as executors of *Henry Stainton*, are to be charged with the items specified in the said list, except so far as they shall, in the opinion of this Court, properly discharge themselves therefrom; and in taking such account all just allowances are to be made. And in all other respects the accounts appearing in the said books, kept by the said testator as agent of the company in *London*, are to be treated as settled accounts, with liberty to the Plaintiffs and Defendants, to surcharge and falsify as they may be advised. And the Defendants admitting that on the account entitled, "*Henry Stainton*, his private account," the sum of  
4018*l.* 10*s.* 1*d.*

1857.  
STAINTON  
v.  
The  
CARRON  
COMPANY.

4018*l.* 10*s.* 1*d.* was due from the said company to *Henry Stainton* at the time of his death, his Honor doth not think fit to direct any inquiry as to this account.

2. And it is ordered, that an inquiry be made what shares in the company the testator was entitled to at the time of his decease, and that an account be taken of what was due to him from the said company in respect of dividends or *bonuses* on such shares, and of what has since accrued, and of what is now due from the company to his estate in respect of any such dividends or bonuses.

And if, on taking the accounts hereby directed, it shall appear, that at the end of each, or any, year from the 30th day of *June*, 1825, a balance remained due from *Henry Stainton* to the company, or from the company to *Henry Stainton*, it is ordered that the amount of such balance or balances be stated. And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply to this Court as they shall be advised.

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NOTE.—The suit was afterwards compromised, the Plaintiffs paying to the company a very large sum of money, and the Court, on behalf of the infants who were interested, sanctioning the arrangement.

1856.

SPICER *v.* SPICER.  
SPICER *v.* DAWSON.  
LAWFORD *v.* SPICER.

Dec. 8, 9  
1857.  
March 9.

**I**N 1838, on the first marriage of the Plaintiff Mrs. *Spicer*, a sum, which now consisted of 17,406*l.* Consols, was settled upon her for life, for her separate use, to the exclusion of any husband she might marry, and subject thereto it was settled on her children.

Property of the wife, amounting to 17,000*l.* Consols, being already settled, the Court refused to settle a further sum of 2,000*l.* belonging to her, and directed it to be paid to the husband.

In 1840, during the first coverture, a further sum of 4,321*l.* Consols was (as the Court held) in like manner settled.

Invalidity of a parol agreement of the husband prior to marriage to settle his wife's property.

In 1847 the Plaintiff's first husband died, and there was issue of the marriage one daughter.

The Court discourages applications to it involving the merits of petty squabbles between husband and wife.

In September, 1854, the Plaintiff married Mr. *Spicer*. Besides the settled property, the Plaintiff was now entitled to other property, which consisted of savings of income during her widowhood and also a sum of about 2,000*l.* the balance of the estate of her brother *Stephen*, to which she was entitled.

Disagreements had occurred between Mr. and Mrs. *Spicer*, and they were now living apart from each other. Mrs. *Spicer* insisted that the whole unsettled fund ought to be settled on her exclusively; first, on the ground that there had been an agreement to that effect prior to the second marriage, and secondly, on the ground that the conduct of Mr. *Spicer* disentitled him to any interest in the fund.

Mr.

1856. Mr. *Rolt* and Mr. *Morris* for the Plaintiff. *Duncan*  
 v. *Duncan* (a); *Ashton* v. *M<sup>r</sup> Dougall* (b).

SPICER

v.

SPICER.

SPICER

v.

DAWSON.

LAWFORD

v.

SPICER.

Mr. *R. Palmer*, Mr. *Bagshawe*, Mr. *Shebbeare*, Mr. *J. H. Palmer*, Mr. *Follett*, Mr. *Renshaw*, Mr. *Martindale*, Mr. *Selwyn* and Mr. *Hemming* for the Defendants.

*The MASTER of the ROLLS*, having decided that the 4,321*l.* Consols was subject to the trusts of the settlement, reserved his judgment on the other point.

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*The MASTER of the ROLLS.*

1857. Upon the fullest consideration of this case, I do not  
*March 9.* think that I am justified in settling the whole of the unsettled property on the wife.

The state of the property stands thus:—As far as I understand it, there is 17,406*l.* 18*s.* 2*d.* Consols in the name of Mr. *Lawford*, as sole trustee thereof, which had been settled on Mrs. *Spicer*, to the exclusion of any husband she might marry, long prior to her second marriage; there is also a further sum of 4,321*l.* 17*s.* 8*d.* Consols, which, according to my decision at the time of the hearing, is settled in like manner, by the effect of the deed of 14th *April*, 1840. This makes together a sum of 21,728*l.* 15*s.* 10*d.* so settled, over which Mr. *Spicer* has no control. The residue of her property not settled consists of such savings of income of Mrs. *Spicer*, during her widowhood, as she may be entitled to, and also a sum, said to be about 2,000*l.*, which is the balance of the estate of *Stephen*,  
 her

(a) 19 *Ves.* 394.

(b) 5 *Beav.* 56.

her brother, which has not yet been divided, and to which Mrs. *Spicer* or, if a settlement of it be not made, her husband, in her right, is entitled.

With respect to the savings, they stand thus:—Mrs. *Spicer* has settled an account with her brother, Mr. *John Dawson*, acknowledging that nothing is due to her on this account; but this was done since the marriage, and since the suit was instituted. Mrs. *Spicer* abides by this account, admits its accuracy, and consequently it binds her, so far as she is a *feme sole*. But it does not bind her husband, and he is entitled to the account of these savings, if the fact be, that upon the other parts of the case Mrs. *Spicer* is not entitled to have these savings settled on her. The 2,000*l.* from her brother *Stephen's* estate ought either to be paid to the husband, or to be settled for the benefit of the wife to the exclusion of Mr. *Spicer*. The same principle must regulate the payment or settlement of both funds.

The grounds on which Mrs. *Spicer* insists on the right of having a settlement made on her of these funds are two:—first, an agreement, made by the husband prior to his marriage and in consideration of it, that this should be done; and secondly, if that fail, that the conduct of Mr. *Spicer* has been such as to disentitle him to any interest in this fund. On the first point, it is admitted that no agreement was made in writing, and a parol agreement by the husband would not have bound him in law, however it might in honor and conscience (a); but, on the evidence, I doubt much whether any such parol agreement was ever made. The brother, on the eve of the marriage, both

1857.  
Spicer  
v.  
Spicer.  
Spicer  
v.  
Dawson.  
Dawson  
v.  
Spicer.

(a) *Warden v. Jones*, 23 *Beav.* 487.

1857.

SPICER

v.

SPICER.

SPICER

v.

DAWSON.

LAWFORD

v.

SPICER.

wrote and stated that the whole of his sister's property was settled and that there was nothing to settle, and the brother was acquainted with the whole property. Mr. *Spicer* had every reason to believe that Mr. *John Dawson* was correct in these statements, and if he was, there was nothing to settle, except the savings of the life income of Mrs. *Spicer*, in case the whole of it had not been employed for her benefit during her widowhood. Nor can I, in going through the case, discover any proof, or indeed any evidence, that Mr. *Spicer* was aware that there existed any property of the lady, who afterwards became his wife, which was not included in settlements previously made, except such arrear as might exist of her separate income unaccounted for.

I am therefore unable to come to the conclusion that, on the ground of any ante-nuptial agreement, Mr. *Spicer* is bound to settle any unsettled property on his wife.

On the second ground, that of the treatment by Mr. *Spicer* of his wife, and his ill-usage to her, I have also come to the same conclusion, after some hesitation and careful consideration of the case, viz.:—That no case is made out to disentitle Mr. *Spicer* to his ordinary marital rights, on the ground of ill-treatment and cruelty. The only part of the case that made me hesitate, was the circumstance that Mr. *Spicer*, when his wife left him in *Edinburgh*, telegraphed to stop her on the road, on the assertion that she was a lady of unsound mind, running away from her relations; an act, I must say, showing an utter disregard of all feelings of propriety and delicacy, which, although I have afforded Mr. *Spicer* every opportunity of explaining or justifying, he has wholly failed in doing.

I have

I have considered the case in two points: first, how it would have stood without this fact; and, secondly, how the other evidence is affected by it. I have thought it necessary to consider it in this first point of view, because it is to be observed, that this act, which I consider so reprehensible, was not the cause of this lady leaving her husband, inasmuch as it occurred subsequently to her having left him. The reason for her having left her husband, and the sufficiency of these reasons must be judged of by the evidence which exists of his previous conduct towards her, assisted, however, as such evidence may be, by the light which may be derived from that act. But for the tinge which that act gives to the evidence of the previous conduct of the husband, I should have thought that a weaker case had rarely been presented to this Court, and here I regret to say, that I am compelled to observe, that Mrs. *Spicer* did not give her testimony *vivâ voce* before me in a manner to impress me favourably in her behalf. Out of consideration for her, I forbear to dilate on the circumstances which have, most reluctantly, brought me to that conclusion; I could not but observe, however, a desire to avoid answering questions she thought might prejudice her, by suggesting infirmity and deficiency of memory. Still it would be difficult, with any allowances for that deficiency, to make me believe, that a lady on good terms with her brother, whom she had not seen for a great length of time, should not have uttered one word to him, or heard a word said by him to her, when he received her at his house, and led her through it to the Mews behind, and placed her in a fly, for the purpose of avoiding the chance of her being traced by her husband.

The details of the acts of cruelty are as little convincing to my mind. I do not go through them in

1857.

SPICER  
v.  
SPICER.  
SPICER  
v.  
DAWSON.  
LAWFORD  
v.  
SPICER.

1857.

SPICER

v.

SPICER.

SPICER

v.

DAWSON.

LAWFORD

v.

SPICER.

detail, but the blow which felled the lady to the earth and left no mark, the place where she was struck having escaped her memory, and the tumbler thrown at her head, which inflicted no wound, and itself sustained no damage, convinced me, that a much more searching examination by witnesses without any bias must take place, before I could arrive to the conclusion to which that lady's Counsel endeavoured to bring me.

The rest of the testimony is as much in favour of the husband as it is against him, and no conclusion, of any importance, can be drawn from thence, and some inference, not unfavourable to him, may be drawn from the evidence, which might have been, but which was not, produced by Mrs. *Spicer*. I repeat, that but for the act of the telegraphic message, I should have considered the case as one of a trifling description; certainly, that fact gives a deeper colour to the case, and induces me to regard the evidence against the husband, on which I think that I can rely, in the strongest light which it is susceptible of. Consequently I have considered that this is now to be regarded as evidence of the acts of a man, who, after his wife had left him, was capable of sending a message of the character I have referred to, for the purpose of arresting her progress. Still so regarding the evidence, other than that of the lady herself which I have already commented upon separately, I am of opinion, that it does not amount to such a justification of her living apart from her husband, as to induce this Court to say, that it will, by reason of his misconduct, sanction and approve of that separation, and will settle everything upon her to the exclusion of the husband, who professes his willingness to receive and treat her kindly.

In



In truth, in this as in most of the cases of this description which have come before me, the faults are mutual, and may be fairly divided between the parties concerned; and I shall not encourage applications which would make this Court, practically, the fomentor and arbitrator of the petty squabbles between a husband and wife, which a little good sense and a little mutual forbearance, would have appeased or prevented, and would have enabled them to live respectably and comfortably, and if not happily, together.

The result is, that in my opinion, the money unsettled must be paid to the husband, and that an account must be taken of that money, and also of the savings of the wife during her widowhood.

1857.

SPICER  
v.

SPICER.  
SPICER  
v.

DAWSON.

LAWFORD

v.  
SPICER.

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1857.

July 18, 31.

Aug. 1.

A copyhold was devised to A. for life, with power afterwards to the executors to sell. A. was admitted, and after her death the executors sold to B. B., before admittance, devised the copyholds. He was afterwards admitted, and died without republishing his will. Held, that (under the old law) B. at the date of his will had an equitable and devisable interest, and not an inchoate legal right, and secondly, that the devise was not revoked by his subsequent admittance.

Heir at law held, under the circumstances, not put to his election.

## SEAMAN v. WOODS.

**WILLIAM CLEVELAND**, being the owner of some copyholds, to which he had been admitted and had surrendered to the use of his will, by a codicil, dated the 25th of April, 1805, devised them to his wife, *Elizabeth Cleveland*, for her life. And he did thereby direct, authorize and empower his executors, *William Cleveland*, his son, and *Thomas Tripp*, or the survivor of them, immediately after the death of *Elizabeth* his wife, to sell the copyhold premises, and to bargain, sell and assure the same to the purchaser or purchasers thereof and his or their heirs, or to such person or persons and to such uses as such purchaser should direct or appoint. The testator died soon after, and at a court held for the manor on the 21st of March, 1806, *Elizabeth Cleveland* was admitted tenant of the copyhold premises for her life.

After the death of the widow, *William Cleveland*, the son (who was the surviving executor), sold the copyhold property to *Edward Seaman*; and by an indenture of appointment and bargain and sale, dated the 29th of March, 1837, and made between *William Cleveland*, the son, of the one part, and *Edward Seaman* of the other part, *William Cleveland*, the son, in consideration of 325*l.*, and pursuant to the power to him reserved by the codicil,

## DATES.

1805. Death of *Cleveland*.  
1806. Widow admitted.  
1837. Sale to *Seaman*.  
1837. Will of ditto.

1838. His admittance.  
1846. His death.  
1850. Death of widow.

Codicil, and in execution thereof, did bargain, sell, limit and appoint the property unto *Edward Seaman*, to hold unto and to the use of *Edward Seaman*, his heirs and assigns for ever, to be holden at the will of the lord, according to the custom of the said manor, and under and subject to the fines and fees accustomed. And *William Cleveland*, the son, thereby covenanted to procure *Edward Seaman* to be admitted tenant of the premises according to the custom of the manor.

1857.

SEAMAN  
v.  
WOODS.

In that state of things, *Edward Seaman*, before being admitted, made his will, dated the 29th of *November*, 1837, whereby, after directing his just debts, funeral and testamentary expenses to be paid by his executrix, he gave, devised and bequeathed all his estate, both real and personal, and of what nature or kind soever the same might be at the time of his decease, unto his wife, *Elizabeth Seaman*, to and for her own sole and absolute use and benefit; but in the event of his wife marrying any future husband, then the testator gave and bequeathed 1,000*l.* out of his estate to his son, *Edward Cleveland Seaman*, for his absolute use; and the testator appointed his wife sole executrix of his will.

On the 8th of *March*, 1838, *Edward Seaman* was duly admitted tenant to the said copyhold premises, to hold to him and his heirs and assigns, according to the custom of the said manor; but the copyhold premises were never surrendered by him to the uses of his will.

*Edward Seaman* died in 1846, without having altered or republished his will, which was not affected by the *Wills Act* (1 *Vict.* c. 26). The Plaintiff, his eldest son, was his heir at law and customary heir.

*Elizabeth*

1857.

SEAMAN  
v.  
WOODS.

*Elizabeth Seaman* enjoyed the copyholds as her own, and died in 1850, having devised her freeholds and copyholds to trustees on certain trusts.

Under these circumstances, the Plaintiff, the customary heir of *Edward Seaman*, now, for the first time, claimed the copyholds by descent, on the ground that they did not pass by his will.

Mr. *R. Palmer* and Mr. *Cole*, for the customary heir. The bargain and sale to *Seaman* had the same effect as that produced by the execution of a power: the appointee was thereby placed in the same position as if he had been named a devisee in the will of *Cleveland*. The will of *Seaman*, in 1837, had no operation on the copyhold, for it was made before his admission, and nothing is "clearer than that the devisees of an unadmitted devisee have no legal title;" *Doe v. Winder v. Lawes* (a). He acquired an inchoate title, which he might have perfected by admission, but not having done so before he made his will, it is inoperative. The distinction between an equitable interest and an inchoate legal right is clearly pointed out in *Phillips v. Phillips* (b). There a testator was, under the will of his uncle, a devisee of copyholds; in some the uncle had a legal seisin, but the testator had never been admitted; in others the uncle had the like seisin, but the testator had not been admitted until after making his will; in others the testator had an equitable interest only, and was never admitted. One question in the cause was, whether any and which of these copyhold tenements passed by the testator's will. Sir *John Leach* said, "Where the uncle, having been admitted, had legal seisin at the making of his will, his devisee had not an equity, but an inchoate

(a) 7 Adol. &amp; Ellis, 211.

(b) 1 Myl. &amp; K. 649, 664.

*choate legal title*, to be perfected by admittance, and the devisee not having been admitted at the making of his will, his devise fails, although there was an admittance subsequent to the will. Where the uncle had never been admitted, and had therefore no legal, but an equitable title, that equitable title vested in his devisee, and passed by the will of the devisee, although he was never admitted."

1857.

SEAMAN  
v.  
WOODS.

Here, *Seaman* took under the execution of a power of sale, which left nothing further for the executor to do; *Seaman* immediately became entitled to be admitted, and until he had perfected this inchoate title by admittance, he had no power of devising the copyhold property in question.

In *Doe d. Winder v. Lawes (a)*, the testator devised a copyhold to his widow for life, and the reversion descended to his son. He died in 1811, and in the same year the son devised the reversion in the copyhold to the widow. The widow was admitted in 1812, "to hold the same according to the will of her late husband." The son died in 1819, without admittance, and the widow devised the copyholds without any further admittance, and died in 1825. It was held, that by the devise of the reversion to the widow, her life estate became merged in the reversion, the admittance to the estate for life became spent, and a second admittance became requisite, and that consequently, the devisee of the widow, who died without any further admittance, had no legal title to the reversion, but that the estate vested in her customary heirs.

*Seaman* was not tenant on the rolls, and therefore the want of a surrender is not supplied by *Preston's Act*, 55 Geo. 3, c. 192.

Mr.

(a) 7 Adol. & Ellis, 195.

1857.

SEAMAN  
v.  
WOODS.

Mr. *Follett* and Mr. *Amphlett*, for the trustees, in protection of the interests of *cestuis que trust*. We do not dispute the principle, that under the old law, prior to the Wills Act, an unadmitted devisee cannot devise; but "an equitable interest in copyholds under a trust or right of redemption or a contract for purchase, being incapable of surrender, was devisable without any such formality, and it is immaterial, in the last case, that a surrender has been made to the use of the purchaser, so long as he has not been admitted, and the right of the equitable owner to devise his interest could not be controlled by the custom of the manor;" *Jarman* on Wills (a). Here, the interest was equitable and devisable, but if not, we contend, secondly, that the testator *Seaman* had in fact been admitted. It is said, that *Seaman's* name is to be read as if it were in *Cleveland's* will: if so, then the admittance of the widow and tenant for life enured to the benefit of all persons entitled in remainder under the will of *Cleveland*. Mr. *Watkins* on this subject observes (b), "Again, though a copyhold be limited to several persons successively, by way of remainder, the admittance of the particular tenant will be the admittance of all, though he be only tenant for years; for the particular limitation and remainders over form but one estate at law. The seisin extends to the remotest remainderman, and those in remainder may surrender their portions or enter when their estate falls into possession, though they never were admitted personally themselves." And Mr. *Coventry* states in a note, that "this rule has been acknowledged in several recent cases;" see *Earl of Bath v. Abney* (c); *Doe d. Whitbread v. Jenney* (d); and *Lord Kensington v. Mansell* (e).

This principle is not varied by the circumstance that  
*Seaman*

(a) 2nd edit. vol. 1, p. 46.  
(b) 4th edit. vol. 1, p. 337.  
(c) 1 *Burr.* 206.

(d) 5 *East*, 522.  
(e) 13 *Vesey*, 253.

*Seaman* acquired the estate under a power of sale, given to the executors for the purpose of avoiding a second fine. An appointee takes in such cases the estate as if there were a limitation to him in remainder in the will itself. This is stated in *Chance* on Powers (a), in the following words:—"Where under a power over real estate, whether general or particular, a limitation is introduced after a preceding estate, as for instance, where an estate is settled on a party for life, and after his decease, on such persons generally, or on such children as he shall appoint, and in default of an appointment over, and the donee exercises his power by limiting to a stranger, or (as the case may be) to a child for life, or in tail, the new limitation is, in general, considered to be a remainder expectant on the donee's life estate, and the subsequent limitations remainders on the new estate; and this, though such new limitations are not within the letter of Lord *Coke's* definition of a remainder as "a residue of an estate in land, depending upon a particular estate, and created together with the same, "or as he adds in another place, at one time."

1857.

SEAMAN  
v.  
WOODS.

The form of the admittance of the widow of *Cleveland*, whether "for her life" or otherwise, does not affect the case, for, as was observed by the Court of Queen's Bench in *Doe d. Winder v. Lawes* (b), the form of admittance is immaterial; "the form of admission, whatever it may be, enures according to the title."

But *Seaman* was himself actually admitted in 1838, and that act had relation back to the implied surrender in 1837 to the use of his will, under the statute of 55 *Geo.* 3, c. 192. The law is, that a "subsequent admission shall operate by relation, and not revoke but support

(a) Vol. 2, page 33.

(b) 7 *Adol. & Ellis*, 210.

1857.

SEAMAN  
v.  
WOODS.

support a will." Thus, "If a copyholder, seised in fee, surrender to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs, and afterwards surrenders to the use of his will, and actually executes such will, and, after such surrender and will made, he be admitted on the former surrender, it will be no revocation of his will, but his admittance shall relate to the time of such former surrender, and so be prior to the will;" *Watkins* on Copyholds (a). "So soon as the surrender is made, so soon is the property barred, and from that time shall the estate be deemed in the surrenderee by relation, on the admission being actually made;" *Watkins* on Copyholds (b).

Mr. *R. Palmer*, in reply, cited *Torre v. Browne* (c); *Doe d. Clarke v. Ludlam* (d).

*The MASTER of the ROLLS* reserved his judgment.

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*The MASTER of the ROLLS.*

July 31.

This is a question of some peculiarity, and is whether these copyholds passed to the customary heir of the testator, *Edward Seaman*, or to the devisee. His will was made before the statute of the 1 *Vict.* c. 26, which would cure any defect of this description, if any defect exists.

The customary heir relies upon the case of *Doe v. Lawes* (e), and the case of *Phillips v. Phillips* (f), under which he contends, that as *Edward Seaman* took under a power contained in the will of the original testator, he

(a) 4th edit. vol. 1, p. 166.

(b) 4th edit. vol. 1, p. 128.

(c) 5 *H. L. Cas.* 555.(d) 7 *Bing.* 275.(e) 7 *Adol. & Ellis*, 195.(f) 1 *Myl. & Keen*, 649.



he had not, under the deed and the contract with the executor, a mere equitable interest, but an inchoate, imperfect legal interest, which was not devisable by his will, he not having been admitted, and which accordingly did not pass by his will, and that, when his admittance took place, this did not enure back to the benefit of the original testator, *William Cleveland*.

1857.

SEAMAN  
v.  
WOODS.

The devisee contends one of two things:—either that there was a devisable interest in *Seaman* under the contract at the time he made his will, or that if not, he took the copyhold under the power contained in the original will, and then that the admittance of the widow enured to his benefit, and operated as the admittance of all persons in remainder.

I have felt an interest in the question, which is one of some nicety, and I have consulted many authorities on the subject, and my opinion is (I will state the grounds for it presently), that there was a devisable interest in *Edward Seaman*, and that it passed by his will.

The view that I take of the case is shortly this:—I think that *Edward Seaman* did not take under the original will of *William Cleveland* in the sense in which that expression is to be understood, such as a person taking in remainder or reversion, or the like, in which case, undoubtedly, an admittance of the first person would, by a species of fiction, enure to the benefit of the others. He, undoubtedly, did take under the will, in a certain sense, that is, he took under the exercise of a power to sell given by that will, but not so that the admittance of the tenant for life could enure for his benefit. But then the question arises, whether he had a good equitable interest in the copyhold property, or  
whether

1857.

SEAMAN  
v.  
WOODS.

whether he had merely an inchoate, imperfect legal right. I do not doubt at all, that an equitable interest in copyholds is a devisable interest; I think it settled by the authorities, all of which are referred to in *Wainwright v. Elwell* (a), where this point was very much discussed, but not determined.

I think *Seaman* had a good and complete equitable interest under the contract with the executor, and I do not think that the fact of the sale taking place under the power detracts from or diminishes the extent of his equitable interest under the contract. There is no question that if the copyhold had been sold by an owner in fee the contract would have conferred such an interest on the contractee, and I think that if it be sold under a power, whether it be one contained in a will, settlement or any other deed, the effect would be exactly the same. I cannot find any authority whatever for holding that the interest of a purchaser of a copyhold would be in the slightest degree varied, where the contract for sale is under a power of sale, from that where it is under a contract entered into with the owner in fee. I find no express decision on the point, but, as far as they go, the authorities and principles all seem to point to the uniformity of interest in the purchaser, whatever may be the title, which authorizes the vendor to sell.

That being so, I am of opinion, that as soon as the contract was entered into, *Edward Seaman* had a good equitable interest, which was devisable by his will. He made his will, and it was, in my opinion, good at that time.

The next question is, what is the effect of the subsequent admittance. If he had merely an inchoate legal right,

(a) 1 *Madd.* 627.

right, then I should be of opinion that it would not be devisable, and that the admittance afterwards would be alone the period from which he could devise the property. The subsequent admittance I am clearly of opinion does not help the case at all; it does not, in my opinion, enure back to the title he took as purchaser, and it does, in fact, create the principal difficulty I felt in this case. But if it does not help, so also I think that it does not injure the title of the devisee.

1857.

SEAMAN  
v.  
WOODS.

As I have come to a clear conclusion that *Edward Seaman* had an equitable and devisable interest, the question is, whether the effect of the admittance was to revoke his will. I am of opinion it did not, and that it left his interest, so far as the efficiency of his will is concerned, in the same situation as before. It was a good devisable interest at that time, which was not altered by the admittance which afterwards took place.

I think it right to state that I have not rested on my own judgment alone in this matter.

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Another question, as to election, was also raised in this case, under these circumstances:—In 1837 *Edward Seaman*, by his will, devised all his real and personal estate to his wife. In 1838 *Edward Seaman* purchased a freehold property, which was conveyed to him in the same year. In 1846 *Edward Seaman* died, without having republished his will, and the freeholds, therefore, really descended on the Petitioner, his heir at law. “But upon the death of *Edward Seaman*, it was (by inadvertence) taken for granted by the Plaintiff, that all the freehold and copyhold estates of *Edward Seaman* had

1857.  
SEAMAN  
v.  
WOODS.

had passed by his will, under the aforesaid devise, to the widow *Elizabeth Seaman*; and under such circumstances, *Elizabeth Seaman* remained and was in the possession or receipt of the rents and profits of all the freehold and copyhold estates of *Edward Seaman*, down to the time of her own death."

*Elizabeth Seaman* died in 1850, having by her will devised and bequeathed all freehold and copyholds and personal estate, in or over which respectively she had any interest or disposing power, to trustees, their heirs, &c., upon certain trusts, under which the Plaintiff, the heir at law of the testator *Seaman*, became entitled, for his life, to the income of all the testatrix's residuary real and personal estate.

Mr. *Follett* and Mr. *Amphlett* contended that the heir must be put to his election.

Mr. *R. Palmer*, *contrâ*, insisted that this was not a case of election.

He cited *Blommart v. Player* (a).

*The MASTER of the ROLLS*.—I will consider this point, and send a note of my judgment to the parties to-morrow.

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August 1. *The MASTER of the ROLLS* declared that the Petitioner, the heir at law of *Edward Seaman*, was not put to his

(a) 2 Sim. & St. 597; 2 Sug. Powers, 159.

his election, under the will of *Elizabeth Seaman*, either to reject the benefit taken under her will, or to allow the freeholds, which were purchased by *Edward Seaman* subsequently to the date of his will and did not pass by it, to go as if the same formed a portion of the estate of *Elizabeth Seaman*, and passed under her will.

1857.

SEAMAN  
v.  
WOODS.

THE ATTORNEY-GENERAL, at the relation, &c.  
v. TRINITY COLLEGE, CAMBRIDGE.

1856.

Jan. 29, 30.

Feb. 7.

THIS was an information filed by the *Attorney-General*, at the relation of three inhabitants of *Uttoxeter*, against *Trinity College*, the *Solicitor-General* and the masters of the three schools, mentioned in the testator's will. It prayed—

Where property is given for charitable purposes which do not exhaust the whole income, one rule is, that this, *primá facie*, is an indication of an intention to benefit the donee.


1. That it might be declared that the *Uttoxeter* school, and the several other schools mentioned in the testator's will, were entitled to the increased income of the estates and hereditaments devised by the will of the testator, or to some share thereof; and that all proper directions might be given, and accounts taken for ascertaining and securing to them what they were so entitled to, in respect

In charity cases, the cotemporaneous acts of a donor are of importance for the purpose of putting a construction upon the instrument

of gift, but the cotemporaneous acts of the donee are only valuable as showing the intention and view of the donee in accepting the gift.

When property is given for charitable objects which do not exhaust the whole income, and the question is as to the right of the donee to the surplus, the case is varied where the donee is a charity, from that where the donee is a trading corporation.

In 1558, a testator devised real estates, which he described as of "the clear yearly value of fourscore pounds or thereabouts," to *Trinity College, Cambridge*, "to their only proper use and behalf," to the intent following, "with part of the rents" to keep, find and maintain three grammar schools, and pay every master 13*l.* 6*s.* 8*d.*, and "with part of the rents keep, &c. a chaplain, and pay him 13*l.* 6*s.* 8*d.*," and he directed other charitable payments. At the testator's death the rents exceeded the specific payments by 1*l.* 6*s.* 8*d.* The rents having greatly increased, the Court, on a critical examination of the will, came to the conclusion, that after providing for the charitable objects, the college was entitled to the surplus rents.

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

spect as well of the past rents and fines on leases of the said property, as in respect of the future rents and profits thereof.

2. That a proper scheme might be framed for the management of the property of the charity, for the regulation of the *Uttoxeter* school, and if necessary, of the other schools, and for the management of the charity generally.

The schools were founded by the Rev. *Thomas Allyn*, who by his will, dated the 20th of *May*, 1558, expressed himself in the following terms:—

“ I *Thomas Allyn* Clerke psone of the *Parishe*  
 “ *Churche of Stevenage* in *Stevenage* in the Countie of  
 “ *Hertford* havinge and earnest zeale desire and mynde  
 “ to sett vpp and maynteyne for eu such good and  
 “ laudable works as may and shalbe to thono<sup>r</sup> and  
 “ glorie of Allmightie God my Maker Savyo<sup>r</sup> and Re-  
 “ deemer do make declare and ordayne this my last will  
 “ touching and concerning the vse order and disposition  
 “ of all and singler my manors messuags landes tene-  
 “ ments and hereditaments w<sup>t</sup> all and singlier there ap-  
 “ purtenncs whatsoever they be w<sup>t</sup> in the Realme of  
 “ *Englande* in maner and fourme following that is to  
 “ saie

“ First I give devise will and bequeath vnto the M<sup>r</sup>  
 “ Fellowes and Schollers of *Trynytie Colledge* in *Cam-*  
 “ *bridge* of Kinge *Henrye* theights foundation all that  
 “ my mano<sup>r</sup> of *Wheston* w<sup>th</sup> thappurtenncs in the Countie  
 “ of *Leicester* and all that my mano<sup>r</sup> of *Wryttlesham* w<sup>t</sup>  
 “ thappurtnncs in the Countie of *Kente* and all and  
 “ singler other my mannors landes tenements and here-  
 “ ditaments w<sup>t</sup> all and singlier their appurtenncs in the  
 “ said

“ said Countie of *Leicester* and in the said Countie of *Kent*  
 “ and in the Countie of *Hertford* aforesaide and in the  
 “ Countie of *Staff* and in the Citie of *London* amount-  
 “ inge to the clere yerely value of fourescore pounds or  
 “ thereabouts and all and singler deds evidences chres  
 “ Court rolls mynyments and wrytings concerning the  
 “ said manors and other the pmysses or any part or  
 “ pcell therof to have and to holde the forsaide manours  
 “ landes tenements heredytaments evidences dedes chres  
 “ wrytings and mynyments and all other the pmisses  
 “ w<sup>th</sup> their appurtenncs vnto the saide M<sup>r</sup> Fellowes  
 “ and Schollars and their successours to their only  
 “ proper vse and behaue for evermore to thintent here-  
 “ after followinge that is to saye That they the s<sup>d</sup> M<sup>r</sup>  
 “ Fellowes and Scholeres and their successours w<sup>t</sup> parte  
 “ of the rents revenues yssues and profitts coming and  
 “ growing of all the same manours landes tenements and  
 “ other the pmysses w<sup>t</sup> thappurtenncs shall from the  
 “ daye of my deathe for ewmore kepe fynde and mayn-  
 “ teyne three severall Free Grammer Scholes one of them  
 “ at *Uttuxeto* in the Countie of *Stafforde* the seconde  
 “ at *Stone* in the said Countie of *Staff* and the third at  
 “ *Stevenage* aforesaid in the said Countie of *Hertforde*  
 “ and shall contente and paye euy yere to euy Schole  
 “ Master of the said thre sewall scholes thirtene poundes  
 “ sixe shillings and eight pence of lawfull money of  
 “ *Englande* for their sewall waiges and stipends  
 “ and also make and ordayne mete and convenyent  
 “ statuts orders rules and constitutions for and touching  
 “ the directyon order and gounannce of the said schole  
 “ M<sup>rs</sup> and Scholers and for learninge of good aucthours  
 “ and prayeing for me their founder mornyng and  
 “ evenyng w<sup>th</sup> the psalme of deprofundis and other suf-  
 “ frages thereunto accustomed w<sup>th</sup> the collett of *Inclina*  
 “ Due Amen &c And I will that *Marcus Petrus Danns*  
 “ shalbe the Schole M<sup>r</sup> of the said Schole to be kepte

c c 2

“ at

1856.

ATTORNEY-  
 GENERAL  
 V.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

1856.

ATTORNEY-  
GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

" at *Stevenage* aforesaide and have the teachinge of the  
" Schollers theare duringe his naturall lif w<sup>t</sup> the consent  
" of the M<sup>r</sup> of the said Colledge for the tyme beinge he  
" doing his duety therein as to that office apperteneth

" And I will and devise that the said M<sup>r</sup> Fellowes  
" and Schollers and their successours w<sup>t</sup> *part of the*  
" *rents* yssues and profetts comge and growinge of the  
" said manours landes and ten<sup>t</sup> and other the pmysses  
" w<sup>th</sup> thapp<sup>t</sup>ences shall from and after my decease kepe  
" fynde and maynteyne for eu one honest chaplin  
" being of good name and fame and being vnpromoted  
" of and unto any spriall benefice or srvice and having  
" no yearely stypende or wages to saye and singe masse  
" two dayes in every weke at the leaste ppetually that  
" is to saye upon the Wednesday and Fryday and often  
" when he is disposed within the Parishe Church of  
" *Sudbury* in the County of *Derb* and in that mass to  
" pray for my soule my father and mothers sowles my  
" Brothers and Sisters sowles and all Christen sowles  
" w<sup>th</sup> the psalme of *De profundis* and the Collectt and  
" suffragis therevnto accustomed and shall content and  
" pay unto the said Chapleyne yerely for his salarye or  
" wages thurtene pounds sixe shillings and eight pence  
" of good and lawfull money of *Englande* or more or  
" less as the sayd M<sup>r</sup> and Fellowes and Schollers and  
" the said Chapleyne for the time being cann agree And  
" I will that Sir *Robert Glassyer* now my Chapleyne  
" have that s<sup>u</sup>ice during his lif if he will so long s<sup>u</sup>ie  
" there

" And I will and devise that the said M<sup>r</sup> Fellowes  
" and Schollers and their successours shall w<sup>t</sup> *part of*  
" *the rents* and reuenues aforesaid kepe and susteyne  
" once in the yere for me ppetually foure sewal obitts or  
" ann saryes solemply by note w<sup>t</sup> all dyvyne s<sup>u</sup>ice  
" accustomed



"accustomed for deade folks to be done for my sowle  
 "and all xpen sowles whereof thoue to be kepte and done  
 "in *Stevenage* aforesaide thother in *Thornell* aforesaid  
 "and the third in *Sherlunde* in the County of *Derby*  
 "aforesaide and the fourth at *Sudburye* in the s<sup>d</sup>  
 "Countie of *Derby* about such tyme of the yere as I  
 "shall fortune to dye on w<sup>t</sup> placebo and derige solely  
 "by note on even and masse of Requiem solely by  
 "note on the morrow following spending and bestowing  
 "yerely at euery of the said obitts fourtie shillings of  
 "good and lawfull money of *Englande* That is to saie  
 "euy prieste that shall helpe to synge derige ou myght  
 "and singe or saie masse on the morrow xij<sup>d</sup> and to  
 "euy Clerke helping to synge dirige on the even and  
 "masse on the morrow vj<sup>d</sup> at euy of the said obyts and  
 "the ou plus and residue of the said sewall somes of  
 "money to be delte and distributed to the nedy and  
 "poore householders of euy of the said pyshes the  
 "same tyme by the discretion of the psone and church-  
 "wardens of euy of the said pyshes for the time beinge  
 "And I will devise giue and bequeth yerely for eumore  
 "to foure olde poore men being householders and  
 "dwellers in *Stevenage* aforesaide to praye vnto Al-  
 "mightie God for the welth of my sowle and all xpen  
 "sowles the some of five pounds sixe shillings and  
 "eighte pence equally amongst theym to be parted and  
 "divided that is to saie to euy of theym xxj<sup>s</sup> viij<sup>d</sup> of  
 "good and lawful money of *Englande* to be paide and  
 "delyued to euy of theym at four termes of the yere  
 "that is to saie at the feasts of the Natuitie of Seynt  
 "*John* the Baptist Seynt *Michael* tharchangell the  
 "byrthe of our Lorde God and thauncyacon of oure  
 "blessed ladye Seynt *Marye* the Vyrge or w<sup>th</sup> in xij  
 "days next ensueinge euy of the said feasts by even  
 "portions The first payment thereof to begynne at  
 "the

1856.

ATTORNEY-  
 GENERAL  
 V.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

1856.

ATTORNEY-  
GENERALv.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

" the feast of the said foure feasts which shall first and  
 " next happen after my decease

" Also I give and bequeath for and towards the  
 " fyndinge of exhibition of one poore scholler w<sup>th</sup> in the  
 " said colledge yerely for eumore fourtie shillings of  
 " lawfull money of *Englande*


" And I give graunt, and will vnto *James Allen* of  
 " *Sherlande* aforesaid one anuall rent of tenne pounds  
 " of lawfull money of *Englande* yerely goying out of  
 " my said manor of *Wheston* w<sup>th</sup> thappurtenncs and out  
 " of all other my lands tenements and hereditaments in  
 " *Wheston* aforesaid and *Blabye* and *Countersthorpe* in  
 " the said Countie of *Leicester* To have levye and  
 " pceyve the said yearlye rente of tenne pounds to the  
 " said *James Allen* and to his heyres and assigns for eu  
 " and to be payed at two feasts of the yere that is to  
 " saye at the feaste of Seynt *Michael* the Archanngell  
 " and thannunciacon of our blessed Ladye Seynt *Marye*  
 " the Vyrge by even portions to be paid The first pay-  
 " ment thereof to begynne at that feast of the said two  
 " feasts which shall furst and next happen after my  
 " decease And I will that yf it shall happen the sayde  
 " yerely rent of tenne pounds to be behinde in part or  
 " in all after any of the said feasts at the which yt  
 " ought to be payde by the space of one moneth and  
 " ytt being lawfully asked then I will that ytt shall be  
 " lawfull to the said *James Allen* his heyres and assigns  
 " into thesaid manor of *Wheston* and other the pmysses in  
 " *Wheston Blabye* and *Countesthorpe* w<sup>t</sup> thappurtenncs  
 " to entre and distreyne and the distresse there so taken  
 " to beare lead dryve and carry awaye and the same to  
 " reteyne and kepe vntill the said *James* his heires and  
 " assignes of the said yerely rent and euy pcell thereof  
 " w<sup>t</sup> the arrears of the same if any such shall fortune  
 " to

“ to be shalbe vnto the said *James* his heyres and as-  
 “ signes fullie contented and payed And I heartely  
 “ Pray the saide M<sup>r</sup> Fellowes and Schollers of the said  
 “ Colledge to demyse graunte and lett to ferme the said  
 “ manor of *Wheston* and all other the pmysses in  
 “ *Wheston Blabye* and *Countesthorpe* vnto the said  
 “ *James* his executours and assignes for the term of  
 “ fiftie yeres next ensueinge after the day of my deathe  
 “ yeldinge and payeinge vnto the said M<sup>r</sup> Fellowes and  
 “ Schollers and their successours yerely duringe the  
 “ said terme of fiftie yeres the yerely rent of xx<sup>li</sup> with  
 “ other reasonable couents to be conteyned in the said  
 “ lease And I will that the said *James* and his heires  
 “ shall yerely defauke abate and deduct tenne pounds  
 “ of the said yearly rent of xx<sup>li</sup> for his and their saide  
 “ yerelye anuytie of tenne pounds during the said terme  
 “ of fiftie yeres

1856.  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

“ Also I will that the said M<sup>r</sup> Fellowes and Scholers  
 “ and their Successours shall will and sufficiently up-  
 “ holde reparye and maynteyne all the houses edifices  
 “ and buyldings in and vpon all and singler the pmysses  
 “ frome tyme to tyme when and as often as nede shall  
 “ requyre for euermore And I will and devise that the  
 “ said M<sup>r</sup> Fellowes and Scholers and their successours  
 “ w<sup>t</sup> part of the rents revenues yssues and profitts of  
 “ the said manours landes and tenements and other the  
 “ pmisses shall as well content and paye vnto the said  
 “ *James Allen* his heyres and assignes the said anuall  
 “ rent of tenne pounds before by this my last Will and  
 “ Testament gyven and willed vnto the said *James* his  
 “ heyres and assignes as also the said v<sup>li</sup> vj<sup>s</sup> viij<sup>d</sup> before  
 “ given and bequeathed to the said foure old poore men  
 “ of the said Parishe of *Stevenage* for evmore

“ And I will that my Executours shal have and  
 “ receive

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

“ receive all the rents and seruics of all the said  
 “ manours landes and tenements and other the pymasses  
 “ that shalbe due for the same at the feast of Seynt  
 “ *Michaell* tharchangell next after my decease Also I  
 “ will that *Nichas Saunder* shal have and enjoye duryng  
 “ his lif all that tenement whrin he nowe dwellith sitt  
 “ and lieng in *Stevenage* aforesaide and all suche landes  
 “ meadowes and pastures nowe letten and occupied w<sup>t</sup>  
 “ the same *Nichas* yeldyng and payeing for the same  
 “ duringe his lif to the said M<sup>r</sup> Fellowes and Scholers  
 “ and to their successours suche yerely rent as heretofore  
 “ he hath vsed to paye anythinge before expressed to  
 “ the contrarye notwithstandinge.”

The testator died in *August*, 1558, and his will was proved by his two executors. At his death the lands were subject to the payment of an annuity of 2*l.* 13*s.* 4*d.* for the life of *Thomasine Newland*, who survived the testator, but died shortly after. After the testator's death the college became involved in several suits respecting the devised estates.

At the time of his death the lands were let on leases, granted in consideration of fines, and the amount of the rental (according to the conclusion arrived at by the Court), was 83*l.*, while the specific payments and the annuity to *Thomasine Newland* amounted to 81*l.* 6*s.* 8*d.*

The rental had greatly increased, and amounted in 1853 to 412*l.* in money, and 43 quarters of wheat, and 119 quarters of malt. The college claimed a right to retain the surplus rents and the fines.

The college had voluntarily increased the salary of the schoolmaster of *Uttoxeter* to 100*l.* a year, and had also made an increase to the others; but the inhabitants  
 of

of *Uttoreter* complained of school regulations, by which Dissenters were excluded, and they insisted by this information, that the college was not entitled to the surplus rent and fines.

1856.  
ATTORNEY-GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

The Solicitor-General (Sir *Richard Bethell*), Mr. *R. Palmer* and Mr. *Giffard*, in support of the Information.

Mr. *Wickens*, for the Solicitor-General.

Mr. *Roupell*, Mr. *Follett* and Mr. *Pemberton*, for Trinity College.

Mr. *W. D. Evans* and Mr. *Dunn*, for the masters of the schools.

The following authorities were referred to:—The *Thetford School Case* (a); *Sutton v. Colefield* (b); *Attorney-General v. Mayor of Bristol* (c); *Jack v. Burnett* (d); *Attorney-General v. Cordwainers' Company* (e); *Attorney-General v. Smythies* (f); *Attorney-General v. Fishmongers' Company* (g); *Attorney-General v. The Corporation of South Molton* (h); *Attorney-General v. The Corporation of Beverley* (i); *Arnold v. Attorney-General* (k); *Attorney-General v. Johnson* (l); *Attorney-General v. Sparks* (m); *Attorney-General v. The Haberdashers' Company* (n); *Attorney-General v. Brazen*

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| (a) 8 Rep. 130, b.                    | (i) 15 Beav. 540, and 6 De G., M. & G. 256.          |
| (b) <i>Duke</i> , 642.                | (k) <i>Showers</i> , 23; 1 Eq. Cas. Ab. p. 98, D. 3. |
| (c) 2 Jac. & W. 294.                  | (l) 2 Jac. & W. 319.                                 |
| (d) 12 Cl. & Fin. 812.                | (m) 1 Amb. 200.                                      |
| (e) 3 Myl. & K. 534.                  | (n) 4 Bro. C. C. 103, 178, and 2 Ves. jun. 1.        |
| (f) 2 Russ. & Myl. 717.               |  |
| (g) 2 Beav. 151, and 4 Myl. & Cr. 1.  |  |
| (h) 14 Beav. 357, and 5 H. L. Cas. 1. |  |

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

*Brazen Nose College* (a); *Attorney-General v. Catharine Hall* (b); *Attorney-General v. Johnson* (c); *Page v. Leapingwell* (d); *Attorney-General v. Coopers' Company* (e).

*The MASTER of the ROLLS* (without hearing the Respondents), said :—

The interval which has elapsed since the Court sat has enabled me to dispose of the question which arises on the construction of this will. During that time, I have considered both the will itself and also the authorities referred to in the very able argument of the *Solicitor-General* on this subject, and this consideration has convinced me that there is, upon the face of this will, a clear and manifest intention, on the part of the testator, to benefit the college.

I have arrived at the conclusion for the reasons I am about to state. In the first place, it is admitted, that the principles laid down by the reported cases do not govern every case, but are merely to be used as rules by which the intention of the donor is to be ascertained from the words he has employed. I must therefore look to these various cases simply as aids to discover that intention where the expressions are doubtful. One of the rules so laid down is, that a surplus undisposed of is, *primá facie*, an indication of an intention to benefit the donee. No doubt it is an intention which may be overruled by various other circumstances, but still from the time of the *Thetford School Case* (f) (although that case is open to the observation which the *Solicitor-General* made on it), confirmed by a great number

(a) 2 Cl. & Fin. 295.  
 (b) *Jacob*, 381.  
 (c) 1 *Amb.* 190.

(d) 18 *Ves.* 46.  
 (e) 3 *Beav.* 29.  
 (f) 4 *Rep.* 130, b.

number of cases down to the present time, that circumstance, standing alone, has been held to be a strong indication of intention, that the donee is to benefit by any augmentation of the rents of the property given for the purposes specified in the will.

1856.

ATTORNEY-  
GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

Now that there was a surplus undisposed of here cannot for a moment be doubted or denied. The testator states that this property is of "the clear yearly value of fourscore pounds or thereabouts," not specifying the particular sum: this therefore removes it entirely from the *South Moulton* (a) and *Beverley* Cases (b), where I referred to the principle laid down in *Page v. Leapingwell* (c), which, although it was not a case of charity, enunciated a principle applicable to all cases of the division of a fund into separate portions. I may omit any further consideration of those cases, because the word "thereabouts" shews that the testator did not mean to cut up the whole income into particular parts, and give the residue merely as a specified sum, the precise amount of which it was not necessary to mention, as it would be ascertained by simply deducting the particular sums from the amount of the specified income. Besides this, it is shewn that in point of fact the property did exceed 80*l.* at that time, and (as far as I can judge from the evidence that is laid before me) it must have exceeded that amount by something like 3*l.* It is true, that the surplus was for the time destroyed or diminished by the fact, that the property was subject to an annuity for the life of *Thomasine Newland*, to the amount of 2*l.* 13*s.* 4*d.* But that circumstance of itself is a strong additional indication that

(a) 14 *Beav.* 357, and 5 *H. L. Cas.* 1. *G., M. & G.* 256.

(c) 18 *Ves.* 463.

(b) 15 *Beav.* 540, and 6 *De*

1856.

ATTORNEY-  
GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.


that the testator intended the college to benefit by this gift. The rents were sufficient, in the opinion of the testator, to pay the charitable charges and also this annuity which must cease on the death of *Thomasine Newland*. He gives no direction whatever for any increase of the endowments or of the various charities upon the death of *Thomasine Newland*; but the college are to pay exactly the same sums during the life of *Thomasine Newland* as they are to pay after her death.

I fully admit this principle, and if it could be applied to the present case it would have brought me to a different conclusion from that at which I have arrived, that if it can be shown, that the testator intended the charities to abate in proportion to any falling off of the rents of the property, then that they would be entitled to any increase, in the same proportion as that in which they would be compelled to decrease. But I see no trace of that; on the contrary, I see indications of an intention which leads me to an opposite result.


In the first place, I observe, that when the rent increases by the death of *Thomasine Newland*, no addition is made to the charities. I find in the second place a surplus of 1*l.* 13*s.* 4*d.* over the 83*l.* which is not applied to any purpose whatever. These are proofs that the testator supposed there would be some surplus which was not appropriated by his will, and which therefore went to the college. There is an additional circumstance appearing in this will, which is a confirmation of such being the view of the testator. He directs that *James Allen* shall have a lease of the property in *Leicestershire* for the term of fifty years, at the yearly rent of 20*l.* It is obvious that he considered that this would be a beneficial lease to *James Allen*, who was the object of his  
his



his bounty. He therefore precluded the college, who were to take this property, from increasing the rent to *James Allen*, or to any person to whom he might leave the property, in case he should die within fifty years, beyond the 20*l.*, which was the amount of the rent which was to be paid for it. It was therefore but reasonable to assume, that, upon the death of *James Allen*, the college would gain an accession of income which they might apply for the charitable purposes, if such had been the intention of the testator; but he gives no direction as to any additional bounty to any of these objects of charity upon the death of this particular person, although in wills of a similar character at that time, it is not unusual for a testator, who foresees an increase of income from the falling in of some lease, or other means, to prescribe, whensoever that event shall arise, in what manner the increased income shall be apportioned among the objects of his bounty.

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

All these circumstances lead me, therefore, to the conclusion that the testator intended the college to benefit by the additions that would from time to time arise to the income of the estate. It is to be observed, also, with respect to the argument founded on the direction that the payments are to be made out of rents, that this direction does not occur in two instances. With respect to the various objects of his bounty, which he has specified, he directs that they shall all be paid "with part of the rents," with the exception of an exhibition of one scholar in the college itself, and with this further exception, that he directs the Master, Fellows and Scholars, and their successors, to sufficiently uphold, repair and maintain all the houses. These payments he does not direct to be made out of the rents; therefore, if the college accepted his gift, they took it with this undoubted obligation, viz., of applying

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

applying 40s. to the support of a scholar on the foundation, and also of sufficiently upholding, repairing and maintaining all the houses upon the property. If this direction applied to the property given to *James Allen*, it is obvious that it gave at least to him a considerable increase to the advantage of the lease he so obtained. These payments, therefore, were a condition imposed upon the college, a condition inseparable from their accepting the gift.

It is to be observed, with respect to this scholar, that he is clearly made a scholar upon the foundation, for it is "I give and bequeath, for and toward the finding of an exhibition of one poor scholar within the said college yearly, for evermore, 40s. of lawful money of *England*." It is true that in *Brazen Nose College Case* there were thirteen, and in this case there is only one. I do not found my opinion very strongly upon this circumstance alone, although, as far as it goes, it shews an inclination both to benefit the college by the establishment of a new scholarship, and also to impose on the college the burthen of supporting it, as a condition on which they were to accept his devise.

I am also struck with this circumstance, which appears to me to be a clear indication of a desire to impose a condition upon the college, in the shape of a burthen in case they accepted the devise; and this is, that he directs that the rents due at *Michaelmas* shall be received by his executors, and not by the college, and, at the same time, he directs that some of the payments shall begin from the moment of his death. With respect to the school-masters, there is no direction as to the period from which their payments are to be made, but there follows immediately after a direction, that "with part of the rents" they shall,

shall, from and after his decease, keep, found and maintain for ever, one honest chaplain, and pay unto such chaplain yearly 13*l.* 6*s.* 8*d.* Then there is a direction to make certain *obits*, and to pay four poor men 5*l.* 6*s.* 8*d.* equally; "the first payment thereof to begin at the feast of the four feasts which shall first and next happen after my decease." He goes on to state, with respect to the gift of the 10*l.* to *J. Allen*, that the first payment thereof shall begin at the first of the two feasts of *St. Michael* the Archangel and the Annunciation of the *Virgin Mary*, which shall first and next happen after his decease. Of course it was impossible for him to anticipate when he might die, but it was quite possible that he might have died early in *November*, in which case it would be obvious that the college would have had to bear these burthens for one year, without any receipt of rent at all. It is impossible, upon the construction of this instrument, that, after having accepted the devise, they could have said, that they were not liable to pay. If they accepted the gift, they would have been distinctly liable to pay the amount due to those persons. No doubt they might, when they afterwards received rents, have applied those rents for the purpose of repaying themselves the amount which they had so paid. No doubt the period at which he would die was a matter of uncertainty, but upon an average, the probability would be that there would be six months between his death and the following *Michaelmas*. It might be just before or it might be just after, but the probability was, that at least some of those payments would have to be made before any rents could accrue due. That, therefore, was a burthen imposed on the college. He directs that the college shall receive no rents up to *Michaelmas*, and at the same time he directs that out of the rent they shall pay various sums, from the period of his death

1856.

ATTORNEY-  
GENERAL  
V.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

1856.

  
 ATTORNEY-  
 GENERAL

 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

death up to the *Michaelmas* following. This is an additional circumstance to shew that the testator anticipated that there would be a surplus of rents sufficient to enable them to meet such growing payments, and that there was a reasonable prospect that the surplus of the rents would be sufficient to meet the payments. I do not by this mean, that the testator supposed that they would during this early period receive sufficient rents to meet these payments, but that the circumstance that the college would afterwards have rents amply more than sufficient to meet all the charges upon them, would be a sufficient inducement to them to pay these charges in the first instance, and to recoup themselves out of the rents which they were afterwards to receive. Unless he so considered it his will is inconsistent with itself, because it directed something which could by no possibility take effect. How is it possible to say, that persons shall only be liable for the rents, as they accrued due, when you specify the time at which they shall first take the rents, and impose as a condition upon them, that out of such rents they are to make payments which became due anterior to such receipt.

This also shews a strong indication of belief on the part of the testator, that this burthen so imposed upon the college would be accepted by them, inasmuch as they might afterwards receive rents which would be sufficient to repay them the advances which they would previously have to make.

It was urged, that the contemporaneous events and the answers which were put in by *Trinity College* in the various suits which occurred, shew that this was not the view which they took of the case, and that they considered themselves only liable to the extent of  
 the

the rents which they actually received. The contemporaneous acts and condition of a donor are of the greatest possible moment and importance, for the purpose of placing a construction upon any instrument of gift executed by him ; but the contemporaneous acts of the donee are of little value for the purpose of placing a construction upon that instrument ; they only shew the intention and the view with which the donee accepted the gift. If any such point as this could be raised, viz., that they were bound by the circumstances of their acceptance of the gift, and that they ought now to be compelled to adopt that particular construction, I should think it a matter of considerable moment, but in my opinion no such question can arise here.

1856.

ATTORNEY-  
GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

In the last place it is contended, that this devise amounts to a general dedication to purposes of charity. Undoubtedly in the case of the *Attorney-General v. The Drapers' Company (a)*, where there was a general charitable intention expressed by the will of the testator, that intention prevailed, and it was held that the donee took no beneficial interest. But it is to be observed, that in that case, the donees were a mere trading corporation and not a charity at all ; but the circumstances are considerably varied where the donee is itself a charity, and therefore might be well considered as fulfilling the object of the testator, when he gave the property for charity generally. It does not at all follow, because where a testator giving property to the *Drapers' Company* for certain purposes has said, that he intended it all to be devoted to charity, the company will not take the surplus, that therefore the same result would follow if the gift were to a college founded solely for religious and educational purposes.

I am,

(a) 2 *Beav.* 508, 4 *Beav.* 67, and 6 *Beav.* 382.



1856.

ATTORNEY-  
GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

I am, however, unable, after careful consideration of the authorities, to distinguish this case upon this point from the case of the *Attorney-General v. Brazen Nose College* (a), which is a very material decision upon this subject, and to which the *Solicitor-General* early called my attention. In fact the words in this case resemble very closely the words in that case, and it would be very difficult to translate the Latin words used in the gift to *Brazen Nose College* by any words in English which would not be equivalent to those used in this will. The expression that it is so given "to the intent hereafter following" does not in the slightest degree militate against the view that I take, that the testator gave the property to the intent that the college itself should benefit by the fluctuations, and enjoy the benefit of the increase which might arise of the rents of the property, if, at the same time, it was to bear the loss which might be sustained by their diminution: and that it was to bear the loss I infer both from the fact of there being a considerable surplus, and from the fact that the testator, as I have already mentioned, makes the charge on the devisees commence before their beneficial enjoyment.


The case of the *Attorney-General v. Mercers' Company* (b) appears to me to be very distinguishable from the present, because, in that case, there was an express direction that if the rents fell off, the various charities should bear the loss, and consequently the diminution was not to fall upon the donees of the property, but the charities themselves. I see nothing whatever to indicate a similar intention in the present case.

I think it unnecessary to go through all the authorities

(a) 2 Cl. & Fin. 295.

(b) 2 Myl. & K. 654.

ties upon the present occasion, all or most of which I have looked at, because the principles upon which they rest are not in dispute. The only question is, how far they apply to the present case. I see a clear and considerable surplus in this case, an accruing surplus which the testator must have known would increase at the death of one person to the extent of 2*l.* 13*s.* 4*d.*, a considerable amount at that period; and a further increase at the expiration of fifty years, when another lease was to fall in; besides this, his direction that *Nicholas Saunders* should retain for life the property which he then held at the same rent as he then paid, which was obviously meant to give him a beneficial interest. The testator, foreseeing the falling in of all those beneficial interests, desired the college to have the benefit of them, and not the various charities which he had created. I am of opinion, therefore, in the present case, that the college is entitled to the beneficial interest in the surplus which has accrued.

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

Although that is the material and principal part of this case, yet there is another part of it on which I should wish to hear counsel, unless some arrangement can be made. In the *Brazen Nose* College Case the direction was to pay so much for the school; here the words are much stronger; they are to keep, find and maintain. Now the question which I wish to suggest to the counsel of the college is this:—I apprehend that it is not the province of this Court to interfere where a corporation or a person is made a mere visitor, but if a trust is created, then the Court will require to see that that trust is properly performed. Now it does appear to me here, that although the college were directed to make rules and to regulate this school, and in that respect may be treated as visitors; yet that there

1856.  
  
 ATTORNEY-  
 GENERAL  
 v.  
 TRINITY  
 COLLEGE,  
 CAMBRIDGE.

may be a great deal to be said upon the question whether they are not trustees of the schools, with trusts to be properly performed. I shall be desirous to hear what counsel have to say on this point, assuming it to be, upon which I do not at present express any opinion, a trust to "keep, find and maintain" a free grammar school. That has certainly not usually been held in this Court to be a school solely for Church of *England* purposes. It is obvious that the founder himself, if you can judge of his own intention, did not desire the religion of the Church of *England* to be taught, because he was himself a papist, and he would have regarded the Roman Catholic religion as the proper religion to be instructed in that school. These have all become free grammar schools.

Now I should wish, without expressing any opinion whatever upon this point, to suggest this, whether, by some communication with the college, some rules and regulations might not be framed for the government of this school, and for the admission of scholars into it, which might extend the benefit to some extent, and make it unnecessary for this Court to interpose at all. In that case, the result would simply be, in my opinion, that this Information ought to be dismissed without costs, and nothing further would be necessary. If no such arrangements can be made, then I will hear counsel upon this question:—whether there exists a trust for the school. If it be a trust, it is one to "maintain" the school sufficiently, having regard to the neighbourhood and its wants. What is *sufficiently* may be a question. All that I want considered is, whether it might not be desirable or prudent, on the part of the college, to moderate somewhat the rigour of the rules adopted in the school.

Assuming



Assuming that I should be of opinion that no trust at all exists, and that the college are merely visitors, I should simply dismiss the Information; but, if I should be of opinion that there is a trust, then I should direct a reference to consider how the schools have been maintained, and whether any modification ought to be made for the purpose of carrying into effect the intentions of the testator. But I should be glad to be relieved from this course by an arrangement which will meet the views of both parties.

1856.

ATTORNEY-  
GENERAL  
v.  
TRINITY  
COLLEGE,  
CAMBRIDGE.

NOTE.—The suggestion of the *Master* of the *Rolls* was adopted by the Defendants, and the Information dismissed.

## LEFEVRE v. FREELAND.

1857.

July 24, 25.

ADMIRAL MILBANKE, by his will, declared, that a sum of 10,000*l.* should be disposed of, “in such manner, and for such uses and purposes, as his daughter, Mrs. *Huskinson*, might direct, by any will or testament.”

By changes of investment, the capital had increased, and in 1844, the sum of 10,000*l.*, part of it, was lent on mortgage to Lord *Methuen*, and 1,495*l.* 1*s.* 5*d.*, the residue was, in 1850, lent on mortgage to Mrs. *Huskinson*.

appointed two other persons her executors. The trusts declared of the appointed fund did not exhaust it. Held, that the surplus fell into the residue, and did not pass as unappointed.

*A. B.* had, under her father's will, a power to appoint 10,000*l.* By changes in the investment, the fund had increased to 11,495*l.*, of which 10,000*l.* was lent on mortgage to *C.*, and 1,495*l.* on mortgage to *A. B.* By her will, after reciting that under her father's will she had power to appoint 10,000*l.*, *A. B.*, in exercise of her power, appointed “the said sum of 10,000*l.* now secured on mortgage of *C.*'s estate, and any other moneys representing the same.” Held, that the whole 11,495*l.* was well appointed.

A testatrix, having a power over a sum of money, appointed it to *A.* and *B.* on certain trusts, and she also gave them, on trust, her residuary personal estate, after payment of her debts. She made no beneficial bequest of her residue, and

1857.  
  
 LEFEVRE  
 v.  
 FREELAND.

In 1855, Mrs. *Huskisson*, by her will, gave her *Eartham* Estate to two trustees (*Milne* and *Gardiner*) for twenty-one years, upon trust to invest the rents and accumulate the income thereof, until the same, together with her residuary personal estate, thereafter directed to be accumulated, should amount to 25,000*l.*, which sum she directed to be laid out in real estates, to be settled to the same uses as her *Eartham* Estate. Subject thereto, she gave her *Eartham* Estate to *William H. T. Huskisson* for life, with remainder to his first and other sons in tail.

And after reciting, that under the will of her father she was entitled to dispose of the sum of 10,000*l.*, she, in exercise of the power, appointed "*the said sum of 10,000*l.* then secured on mortgage of Lord Methuen's Estate, and any other moneys representing the same,*" unto her said trustees, as to 5,000*l.* (part thereof) for Sir *J. R. Milbanke*, and as to 2,000*l.* (other part thereof) upon trust to pay a bond of her late husband, and as to 3,000*l.* (other part thereof) upon trust to invest the same in their names in the public stocks, and pay the income to her niece, *Caroline Eliza Tilghman*, for life, and on her death the testatrix directed her said trustees and trustee, *out of the said moneys and securities*, and out of her residuary estate, to raise the sums following, viz.: The sum of 1,000*l.* for her great niece, *Caroline Tilghman*; the like sum of 1,000*l.* for her great niece, *Harriet Tilghman*; the sum of 1,100*l.* for her great niece and goddaughter, *Emily Tilghman*; and the sum of 1,000*l.* for her great nephew, *Richard Tilghman*. And the testatrix directed that the four last-mentioned legacies or sums should be paid free of legacy duty after the death of *Caroline Eliza Tilghman*, *if the said legatees respectively should be then living, but if dead they were not to be paid.*

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The testatrix gave the residue of her personal estate, after and subject to the payment of her just debts and funeral and testamentary expenses and legacies, unto the said trustees, upon trust to convert, and by such investment thereof and of the income thereof as was declared of the rents of her *Eartham* Estate, to permit the same to accumulate for twenty-one years, until, by such means and the accumulation of the rents of her *Eartham* Estate, the sum of 25,000*l.* should be accumulated. She made no other disposition of the ultimate residue, and she appointed *Freeland* and *Huskinson* executors.

1857.  
LEFEVRE  
v.  
FREELAND.

By a codicil, the testatrix recited the fact that she had, by her will, appointed *all the moneys* she had power to appoint under her father's will.

She died in April, 1856, and her will was proved by her executors, *Freeland* and *Huskinson*.

The 10,000*l.* now amounted to 11,463*l.* 14*s.* 7*d.* sterling, which sum was in the hands of the trustees of the will.

Under the above circumstances, various questions arose, which were the subject of the present special case, and are sufficiently specified in the argument of counsel.

*Mr. Pemberton*, for the Plaintiff, the trustees of the will, stated the case.

*Mr. R. Palmer* and *Mr. Druce*, for *Mr. Huskinson*, the tenant for life of the *Eartham* Estate.

The

1857.  
  
**LEFEVRE**  
**v.**  
**FREELAND.**

The whole fund is well appointed, either directly or by implication, *Foster v. Cautley* (a); or by force of the recital in the codicil, *Jordan v. Fortescue* (b). So much of the appointed fund as may not be required for the payment of the legacies falls into the general residue, and is applicable to raising the 25,000*l.* The 1 *Vict.* c. 26, s. 27, provides, that "A bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." They also cited *Culsha v. Cheese* (c); *Re Spooner* (d).

Mr. *Selwyn* and Mr. *Wright* for the next of kin. The whole of the fund is well appointed upon trust, but the excess, after performing the trust, forms a particular residue undisposed of by the will, which therefore belongs to the next of kin.

Mr. *Follett* and Mr. *Wintle* for the representatives of Admiral *Milbanke*. First, the whole fund is not duly appointed, but only sufficient to provide the legacies, rateably with the general residuary personal estate; the surplus belongs to the estate of Admiral *Milbanke* as unappointed. In *Easum v. Appleford* (e) the testatrix had a power of appointing 3,000*l.* which had become blended in an investment with her own funds. She appointed 2,700*l.* to her mother (who died before her) and 250*l.* to another person, and the residue of the said  
 stocks

(a) 6 *De G., M. & G.* 55.

(b) 10 *Beav.* 259.

(c) 7 *Hare*, 236.

(d) 2 *Sim. (N. S.)* 129.

(e) 10 *Sim.* 274, and 5 *Myl.*

& *Cr.* 56.

stocks and funds upon the trusts declared concerning her residuary estate. It was held that the 2,700*l.* which had lapsed by the mother's death, was unappointed.

1857.  
  
 LEFEVRE  
 v.  
 FREELAND.

The surplus, and any sum which may not be required, in case of the death of the contingent legatees in the life of *Caroline Eliza Tilghman*, whereby the legacies will fail, will belong to the author of the power. *Brookman v. Hales* (a); *Hutcheson v. Hammond* (b). They also distinguished this case from *Chamberlain v. Hutchinson* (c), for there the appointment was made to the executors, and the lapsed portion of the fund, therefore, constituted part of the testatrix's estate, but here the appointment was to distinct trustees, and not to the executors, so that the lapsed fund never fell into the residue, but was undisposed of.

*The MASTER of the ROLLS.*

I will look at the authorities. The view I take, at present, of the case is this:—It is not seriously contended, and could not be contended with any reasonable prospect of success, that there is not, in the first instance, an appointment of the whole fund to the trustees. It is not only an appointment of the 10,000*l.* but of “any other moneys representing the same,” which would include the fund and all additions to it. Although it is not an appointment to her executors, it is an appointment to two persons whom she had constituted trustees of her real and personal property for the purposes of the will. Other persons were appointed executors, whose duty it was to prove the will and pay the debts, but the whole of the residue and the appointed fund

(a) 2 *Ves. & B.* 45.

(b) 3 *Bro. C. C.* 128.

(c) 22 *Beav.* 444.

1857.  
  
 LEFVRE  
 v.  
 FREELAND.

fund is given to these two trustees. I think that this is an union of the two funds, and that it was intended that they should coalesce, for the same purposes as general personal estate, and be treated as if the trustees had been appointed executors; I think that the fact of their not being executors does not alter the construction, for the testatrix has united the two funds together. It is material to observe in what way the fund is given:—5,000*l.* is given to Sir *J. R. Milbanke*, 2,000*l.* to pay the husband's bond, and she directs 3,000*l.* "other part thereof," (not calling it "the remainder" as she would, if the fund appointed were only 10,000*l.* sterling) to be invested, and the income paid to *Caroline E. Tilghman* for life. The testatrix goes on to direct how the remainder should be applied on her death, she says, "Out of the said moneys and securities, and out of my residuary estate, to raise the sums following," 1,000*l.*, 1,000*l.*, 1,100*l.* and 1,000*l.* She had appointed the whole of the 10,000*l.* "and any other moneys representing the same," and had directed that the 3,000*l.* should be invested in their names in the public stocks, &c. It is said that the direction to raise the four contingent legacies out of "the said moneys and securities" was intended only to apply to the securities on which the 3,000*l.* was invested. That may be so, but having made an appointment of the whole, and made a mixed fund with her residuary estate, I am of opinion that she treated the whole as forming part of her personal estate, and that she intended the whole to be applied in the manner she has stated.

The result will be, that not only the reversion of the 3,000*l.* but the 1,463*l.* 14*s.* 7*d.* (being the surplus), form part of her personal estate for the purpose of raising and paying these four legacies, and if they fail, then for the other purposes.

This

This seems the only question on which there is any difficulty. With respect to the construction of the statement made by the testatrix in the codicil, "that she had by her will appointed all the moneys she had power to appoint under her father's will," it is argued that she meant that she had appointed the whole on trust only; but that is not the ordinary meaning of the words, she means that she had appointed it out and out, and not that any part was to go as if she had not appointed it at all.

1857.

LEFEVRE  
v.  
FREELAND.

Though I do not go into the question as to the codicil operating as an appointment, which is not necessary at present, my opinion is, that the whole was appointed by the will, and that this is explained and illustrated by the codicil. Therefore the whole is to be treated as one fund, and there is no general gift of that part of it which might fail. The result will be, that the 3,000*l.* must be set apart for the tenant for life, and there will be an additional 1,100*l.* to provide for the contingent legacies.

I dissent from the argument which would bring me to the conclusion, that the residue to be treated as undisposed of, and that only the income of it is to accumulate with the rents of the *Eartham* estate. The words as to accumulating the residue are, "by such investment thereof and of the income;" that means to accumulate the capital and the income until such accumulations, together with the accumulations of the rents, amounts to 25,000*l.* Mr. *Huskisson* is entitled to be let into possession of the estate when the capital and accumulations and the rents of the *Eartham* estate shall amount to 25,000*l.*

I am of opinion also, that it necessarily follows, that  
in

1857.  
  
 LEFEVRE  
 v.  
 FREELAND.

in case after the accumulations have been made, any one of the contingent legatees should die in the life of the tenant for life, the part of the residue of the fund subject to the power will go as residue undisposed of, and not as an unappointed fund.

If I see any reason to doubt my present conclusion, I will mention the case to-morrow.

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*The MASTER of the ROLLS.*

July 25. I have read the will and have come to the same conclusion as I did yesterday. I accurately collected the effect of the will. I have considered it more fully, and consulted the authorities referred to without altering my opinion.

The case of *Easum v. Appleford* in one view of the case confirms my conclusion.

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ABSTRACT OF DECREE.

Declare, that the whole of 11,463*l.* is well appointed by the testatrix for the purposes of her will, and by virtue thereof forms part of her personal estate, and that the whole thereof, subject to the payment of and securing the legacies and contingent legacies, is applicable, together with the rents of the *Eartham* estate, and the residuary personal estate, towards making up the sum of 25,000*l.* directed to be accumulated.

And the Court is further of opinion, that in case any of the four contingent legatees shall depart this life after the trusts for the accumulation of the 25,000*l.* have been completed, and during the lifetime of the said *Caroline Eliza Tighmun*, their contingent legacies will constitute part of the said residuary estate of the testatrix undisposed of by her will.



1858.

## DAVEY v. DURRANT.

April 17.

**T**HE Defendant *Durrant*, who was a mortgagee, had, in pursuance of the decree, filed an account of the moneys received by him, being the purchase moneys of parts of the mortgaged estate sold by him, and of the moneys due to him under his mortgage security, and which account was verified by his affidavit. The Defendant had attended at the request of the Plaintiff, to be cross-examined on his affidavit, but he refused to be sworn or be cross-examined until the Plaintiff had paid him his expenses, and it had been held, upon a former occasion (a), that under such circumstances, the Plaintiff was bound to pay the Defendant's expenses in the same way as a witness, under 15 & 16 *Vict. c. 86, s. 38*.

A Plaintiff had required the attendance of a Defendant to be cross-examined on his affidavit. He attended, but it was held that he was entitled to his expenses as a witness. The Plaintiff then abandoned this course of proceeding, and filed interrogatories for the Defendant's examination. Held, that this could not be done until the costs of the former proceeding had been paid.

The Plaintiff thereupon declined to proceed with such cross-examination, and filed interrogatories for the examination of the Defendant, as an accounting party. It was objected by him that this could not be done until the aforesaid expenses had been paid. The matter was, at the Plaintiff's request, adjourned from Chambers to take his Honor's opinion on the point.

Mr. *W. W. Cooper*, for the Plaintiff, submitted that the Plaintiff was entitled to forego the cross-examination, and to file interrogatories for the purpose of examining the Defendant as to his account.

Mr. *Baggallay* argued that the same thing could not be

(a) *Ser post.*

1858. be done a second time by a different proceeding, until the costs of the first attempt had been paid. *Oldfield*  
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DAVEY v. *Cobbett* (a). He said that the clear object of the  
v.  
DURRANT. present proceeding was to avoid paying the former costs.

*The MASTER of the ROLLS.*

I think the Plaintiff cannot abandon one mode of proceeding and adopt another without paying the costs to which he has put the other party on the former proceeding. The Plaintiff must pay the Defendant what is proper before he can compel him to answer the interrogatories and he must also pay the costs of this application.

(a) 12 *Beav.* 91.

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NOTE.—Affirmed by the Lords Justices, 26th of *May*, 1858.

1857.

## WALLER v. BARRETT.

Nov. 21, 24.

**T**HE testator *Scarman* died in 1816, having, by his will, given his property to his wife for life, and afterwards on trust for his three daughters and their children. His executors proved his will.

An executor fairly stating the facts, and paying over the assets under the direction of the Court, in an administration suit, is fully indemnified against all existing or contingent demands on the estate.

The testator, at his death, was possessed of some leaseholds, and by the decree made in 1854, in a suit for the administration of his estate, an inquiry was directed "whether the testator's estate and effects, or his personal representative, were subject to any and what liabilities in respect of his leasehold estates, and whether any and what indemnity against such liabilities ought to be provided or made, and in what manner."

Principles on which the Court acts in giving an indemnity to executors against the outstanding leasehold covenants of their testators.

The chief clerk's certificate found, that the testator was, at the time of his death, assignee of a lease, dated the 28th of *February*, 1793, granted by lessees under the *City of London* to *James Melvin*, of a house and premises, No. 68, *New Bond Street*, for a term of ninety years, which would expire at *Midsummer*, 1883, at the yearly rent of 78*l.* 15*s.*

Executors held, under the circumstances, entitled to no further indemnity against the leasehold covenants of the testator than the recognizance of the parties beneficially entitled to his estate.

The lease contained covenants by the lessee to pay the rent and taxes, to insure the premises against fire, to rebuild in case of fire, to keep the premises in repair, not to carry on any noisome or offensive trade, &c. And by the assignment the testator covenanted to pay the rent, to perform the covenants of the original lease, and to indemnify the assignor, his heirs, &c. against such rent and covenants, and all actions, &c., damages, costs,

1857.

WALLER

v.

BARRETT.

by reason or means thereof, or the nonpayment or non-performance thereof.

The testator had underlet this property for a term which would expire at *Christmas*, 1872, at the yearly rent of 105*l.* being an improved rent for the house and premises of 26*l.* 5*s.* per annum.

The testator was also, at the time of his death, assignee of a lease, dated 21st *October*, 1793, of the stables, &c. at the rear of the house in *New Bond Street*, from *Lady-day*, 1809, for a term which would expire in 1883, at the yearly rent of 13*l.* 13*s.* This was underlet at a total improved rent of 63*l.* 7*s.* a year. This lease contained similar covenants, and the testator had entered into the like covenants to indemnify his assignor.

By an order in this suit, made in 1854, the leaseholds were ordered to be sold. They were accordingly sold and assigned to the purchasers, who covenanted, in the usual way, to indemnify the assignor and the estate of the testator against the rent and the covenants in the original lease.

The residue of the testator's estate now undisposed of consisted of a sum of 755*l.* £3 per Cents. in Court, and 308*l.* £3 per Cents. in the names of the legal personal representatives.

The chief clerk found that "the indemnity given by the respective purchasers of the testator's leasehold estates by the assignments, together with a recognizance to be entered into by the parties beneficially entitled to the testator's personal estate, to refund, as the Court should direct, any part of such personal estate which the Court might order to be paid to them respectively, in the event of any claim being hereafter established  
against

against the estate and effects of the testator, or against his personal representatives, in respect of such contingent liabilities, would be a proper and sufficient indemnity against the said contingent liabilities."

1857.  
WALLER  
v.  
BARRETT.

The Defendants, the executors of the last surviving executrix of the testator, took out a summons to vary the certificate, by finding that the above sums or a competent part thereof ought to be retained and set apart as an indemnity against the liabilities, or that some other proper and sufficient indemnity might be provided against them.

Mr. *Selwyn* and Mr. *Sheffield*, in support of the adjourned summons, argued that the rule of the Court in such cases was, to afford the executors, who were liable at law to the extent of the assets, a substantial indemnity, by retaining a reasonable portion of the funds, and that the circumstances of the present case required such a retainer, for the position of the parties beneficially entitled was such as to render their personal obligation of no value. They argued that the chief clerk had proceeded on a wrong principle in holding that the covenants of the purchasers were a sufficient indemnity. They referred to *Dean v. Allen* (a) and *Brewer v. Pocock* (b).

Mr. *R. Palmer* and Mr. *Martelli* were not called on.

*The MASTER of the ROLLS.*

I will communicate with my chief clerk, and read the papers. At present I think the indemnity sufficient.

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(a) 20 *Beav.* 1.

(b) 23 *Beav.* 310.

*The*

1857.

*The MASTER of the ROLLS.*

WALLER  
v.  
BARRETT.  
Nov. 24.

I have read through these papers, and have considered the question with some pains. The title is involved, but I am of opinion, upon the facts of this case, that sufficient indemnity is afforded to the executors by the certificate. The only way in which the executors, or the testator's estate, could be affected, would be by an action brought by the ground landlord; and upon the facts of this case, it would be obviously more for his interest to eject the persons in possession, than to bring any action on the covenants. I am, therefore, of opinion, that the proposed indemnity is sufficient.

I think it necessary to make one or two further observations. I wish to express the view which I take of these cases, in order not only that it may be clearly understood, but that if it be wrong, my judgment may be set right in another place. The view I take of these cases is expressed in *Dean v. Allen (a)*, and which is this: that where executors have fairly placed all the circumstances before the Court, and act under its orders, they will be indemnified against all future liabilities. I will refer to one or two authorities on the subject, in order to make the grounds on which I proceed plain. In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the Court having administered the assets protects the executors against all future claims.

(a) 20 Beav. 1.

claims. The creditor, however, is not left without his remedy, but that remedy is not against the executor. That principle is so fully established in this Court, that it is unnecessary to cite many authorities on the subject; but this is what Lord *Eldon* says in *Gillespie v. Alexander* (a) on the subject:—"If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees to bring back the fund, he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all."

1857.  
WALLER  
v.  
BARRETT.

The *dicta* and authorities on this are exceedingly numerous. They are to be found in *Brooks v. Reynolds* (b), *David v. Frowd* (c), *Williams v. Jones* (d), and in *Knatchbull v. Fearnhead* (e), in which Lord *Cottenham* makes these observations:—"Where an executor passes his accounts in this Court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in Court, he does it at his own risk." That is the principle upon which the Court proceeds in such cases. So in *Lowe v. Carter* (f), Lord *Langdale* makes this observation:—"It is to be regretted, that the jurisdiction of the Court, in such cases, cannot be exercised at a less expense, but when we so frequently see suits instituted against executors, after a considerable lapse of time, and find them held personally responsible for acts done by them in mistake, but with the most honest intention, the necessity of giving them every opportunity of exonerating themselves by passing their accounts in this Court

(a) 3 *Russ.* 136.

(b) 1 *Bro. C. C.* 183.

(c) 1 *Myl. & K.* 200.

(d) 10 *Ves.* 77.

(e) 3 *Myl. & Cr.* 122.

(f) 1 *Bcav.* 431.

1857.

WALLER  
v.  
BARRETT.

Court is obvious." These are only some of the observations to which it is possible to refer, to shew that in the case of an existing debt the executors are perfectly exonerated, if they bring all the facts which are within their knowledge before the Court, and pay away the assets under its direction.

I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time, he may be ignorant of the whole proceeding, and yet if he do not come in and claim, his only remedy in this Court is against the legatees. In the case of *March v. Russell* (a), Lord *Cottenham* made this observation:—"Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee." I hold that this, in fact, is the principle which governs these cases, that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise hereafter), that the Court requires what is called "an indemnity to the executor" to be given; but if he has stated the facts to the Court, and has acted under its direction, I apprehend that his indemnity is complete and perfect, so far as he is concerned.

In *Fletcher v. Stevenson* (b), Sir *James Wigram*, who certainly took very great pains with these cases, makes these

(a) 3 *Myl. & Cr.* 31.

(b) 3 *Hare*, 360, 370.



these observations, in a case in which he ordered a sum of money to be retained in Court as an indemnity:—"So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the Court, but in considering what degree of protection is due to the absent covenantee, I am bound to consider, whether the Court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." In that case he ordered a sum of money to be retained in Court, but stated that to be the principle on which he proceeded. In *Dean v. Allen* (a), I made the same observations and referred to those cases, stating that it appeared to me, that if the executor acted under the direction of the Court, and laid everything he knew fully and fairly before the Court, he would be protected for the future, and that the Court would prevent him from being sued and from sustaining any injury, in case a creditor should afterwards arise.

1857.

WALLER  
v.  
BARRETT.

There are some *dicta* on the point which would perhaps bear a different construction, but I am unable to find any *dictum*, and certainly no decision, which bears directly against that view of the case, and which appears to me to be the principle and good sense of the matter. In *Dean v. Allen*, the case of *Simmons v. Bolland* (b) was referred to, where Sir William Grant says that the decree of the Court is no protection to the executor, but Mr. Beavan has given, in a note (c), as I think, the proper answer to that observation:—"It appears from the argument in *Simmons v. Bolland*, that that suit was not for the general administration of the estate, and this circumstance might therefore justify the observations

(a) 20 *Beav.* 1.(b) 3 *Mer.* 547.(c) 20 *Beav.* 5.

1857.

WALLER

v.

BARRETT.

observations of Sir *William Grant*, that the decree would not protect the executors."

This must be guarded against in my observations :—I do not mean to say, that where an executor is ordered to pay a sum of money, in a suit which is not for the administration of the assets, it will protect him from creditors. But, I apprehend, that if, in a suit for the administration of assets, the Court orders him to pay the money, that is a perfect security to him personally; for unless that were so, it would paralyse the functions of this Court. This Court in fact acts on the same principle with respect to non-existing debts which may hereafter arise, as it would in the case of existing debts not proved. The indemnity given is only for the sake of effecting a security, in case the Court sees a reasonable probability that a creditor who is now unable to establish his case may afterwards come forward. My opinion does not interfere with, but rather carries out, although in a different form, that which Lord *Cottenham*, in *March v. Russell*, stated was the old practice.

This being the view which I take of these cases, I have thought it desirable to state it, although it does not at all affect my judgment in this particular case, which proceeds on the facts. I think they afford a sufficient proof that the ground landlord would proceed by ejectment rather than by an action of covenant against the original lessee, by which alone this testator's assets could be affected.

I think the case of the executors fails and that the chief clerk's certificate must be confirmed.

1857.

READE v. WOODROOFFE.

**T**HIS case came before the Court upon exceptions to the answer for insufficiency.

The Plaintiff and the two Defendants were solicitors. The bill stated, that in *April*, 1848, it was agreed between them that the Defendants should carry on, in their own names, the business of the *London* clients of the Plaintiff, as agents for him, on the terms of the Plaintiff being entitled to half of the net profits arising from such business, and the Defendants to the other half. That the Plaintiff accordingly delivered over the papers, and introduced his *London* clients to, and recommended them to employ, the Defendants, which they accordingly did.

The Plaintiff complained, that the Defendants had not accounted to him for the profits, although they had sent him an imperfect account on the 7th of *February*, 1851, with a letter stating: "As you have now returned to town, we shall be glad if you will apply to the several parties and take the papers out of our hands, *as we do not purpose longer to continue to carry on their business upon agency terms.*"

The bill alleged, that the Plaintiff remonstrated, and that in consequence, the Defendants continued to carry on the business on the same terms as before. It prayed a declaration that the Defendants were liable to pay the Plaintiff

Nov. 4.

Unless a Defendant plead to the discovery, he is bound to answer fully.

When substantial information is given by the answer, the Court discourages exceptions for insufficiency, and will not require minute and vexatious discovery.

The bill required discovery and accounts from *July*, 1850, of dealings between the Plaintiffs and Defendants. A Defendant, by his answer, stated that they had terminated, by consent, in *February*, 1851, and he refused to set out the subsequent matters. Held, that he was bound to do so.

1857. Plaintiff a moiety of the profits, and sought an account thereof down to the 1st of *January*, 1856, and an account of all dealings and transactions between the Plaintiff and the Defendants.

READE  
v.  
WOODROOFE.

The interrogatories contained searching inquiries as to all pecuniary dealings and transactions between the parties since *July*, 1850; and an account of all moneys advanced to the Plaintiff, and paid to the Defendants, "distinguishing the name of the client, and on what business the same was paid, and what balance was due, and an account of all profits made in every year since *July*, 1850, in respect of the business of the Plaintiff's *London* clients, distinguishing the amount of profits made in respect of the business of each client, &c., &c. They required the Defendants to set out the clients introduced, and the particulars of their employment, and the particulars of the documents in the Defendants' possession.

To this bill, the second-named Defendant, by his plea and answer, pleaded the Plaintiff's insolvency as to matters prior to the 31st of *July*, 1850. He stated and insisted that the above arrangement had been finally determined on the 7th of *February*, 1851, by the letter of that date; and he denied that the business had after that time been carried on upon agency terms. He set forth accounts between the insolvency and the 7th of *February*, 1851, but declined to set forth the subsequent accounts, or to state whether he transacted business since the month of *February*, 1851, for any of the Plaintiff's clients.

The answer to the interrogatory as to the possession of books and papers was clearly insufficient.

The

The Plaintiff took five exceptions, which now came on for argument.

1857.

READE

v.

WOODROOFFE.

Mr. *Lloyd* and Mr. *Jessel*, in support of the exceptions, argued, that the Defendant's denial on oath that the arrangement was continued subsequently to the 7th of *February*, 1851, did not deprive the Plaintiff of his right to a full discovery.


Mr. *R. Palmer* and Mr. *Martindale*, *contrd*, argued first, that there was sufficient in the answer to enable the Court to determine the rights of the parties and the extent to which the Plaintiff was entitled to an account. Secondly, that the discovery insisted on was vexatious and useless, and that the Court had the power and would protect a Defendant from being harassed by useless discovery. Thirdly, that the discovery involved a breach of professional confidence, by requiring the Defendants to set out an account of the business transacted and the private affairs of the clients. Fourthly, as to books and papers, they argued that since power had been given to Plaintiff to obtain production of documents in chambers, under the 15 & 16 *Vict.* c. 86, s. 18, and *Ord. Can.* (a), exceptions for insufficiency of answers to interrogatories as to books and papers had been discouraged; *Law v. The London Indisputable Life Policy Company* (b); *Perry v. Turpin* (c); *Barnard v. Hunter* (d); *De la Rue v. Dickinson* (e).

The following cases were also cited: *Adams v. Fisher* (f); *Swinborne v. Nelson* (g); *Clegg v. Edmon-*

son

(a) Page 530.

(b) 10 *Hare*, App. xx.(c) *Kay*, App. xlix.(d) 1 *Jur. N. S.* 1065.(e) 3 *Kay & J.* 388.(f) 2 *Keen*, 754 and 3 *Myl. & Cr.* 526.(g) 16 *Beav.* 416.

1857. *son (a); The Great Luxembourg Railway Company v. Magnay (b).*  
  
 READE  
 v.  
 WOODROOFFE.

*The MASTER of the ROLLS.*

I must allow these exceptions. The principle I have usually followed is stated in the cases which have been referred to. I have adopted the rule that a Defendant, in order to avoid a full discovery, must protect himself by plea, and that if a Defendant answer he must answer fully. I simply refer to the cases, and am glad to be reminded of what was done in them upon appeal, from which I should judge that they were rather confirmed than shaken.

I am very desirous that the suitors should come to the real subject in dispute as early as possible, and where I see that the substantial information is given, though not strictly and technically, I have always discouraged exceptions; but where information is refused, it is the duty of the Court to enforce it. Here the discovery is refused as to matters since the 7th of *February*, 1851; but the books and facts when produced may show, that there was an agreement between the parties for continuing the arrangement, or that species of implied agreement which is to be deduced from the conduct and expressions of the parties, and from the manner in which they treated the business transaction. I guard myself, however, from expressing any opinion whether the letter of the 7th of *February*, 1851, did or did not put an end to the agreement, because the right to a decree and the right to discovery are separate and distinct matters. It being admitted that the insolvency has settled all matters between

(a) 22 *Beav.* 125.

(b) 23 *Beav.* 646.

tween the parties up to the time when the Plaintiff got his discharge, and that certain transactions have taken place since, which are not covered by the plea, it is impossible to say that the Plaintiff is not entitled to the discovery.

1857.

READE

v.

WOODROOFFE.

The first objection made is the difficulty of giving the discovery asked, which is searching and minute. But if I find that the Defendant has given a substantial answer, I shall not require of him a minute and vexatious discovery. Secondly, it is said that there will be a breach of professional confidence, but if it will be violated by giving a discovery of matters subsequent to the 7th of *February*, 1851, it is as much violated by the discovery already given up to that time. I think the Defendant is bound not to prejudice the interests of his clients, but I think he can give the discovery in such a manner as to avoid that consequence; besides, although he now states that a discovery will be a breach of professional confidence, his answer does not raise that objection.

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1857.

*Re* ELLIS' SETTLEMENT.

Nov. 14.

The Trustee Act held to apply to a case in which the executor of a surviving trustee had not proved the will and had neglected to transfer stock on the requisition of new trustees appointed out of Court.

The Court directed the circumstances bringing a case within the Trustee Act to be inserted in an order vesting the right to transfer stock.

UNDER a settlement made in 1810, a sum of 5,916*l.* New 3*l.* per Cents. was placed in the names of two trustees (*Everett* and *Ellis*), upon the usual trusts. *Everett* died on the 6th of *November*, 1856, and *Ellis* died a few days after, having by his will appointed his widow executrix. She had not yet proved the will.

In 1857, two new trustees were appointed under a power contained in the settlement, and a petition having been presented, under the Trustee Act, by the tenant for life and the new trustees, the Master of the Rolls made an order vesting the right to transfer the fund to the new trustees. The order, on the face of it, purported to be made on the allegation "that there was no legal personal representative of" *Ellis*, who survived *Everett*.

The Bank of *England*, having objected to act upon the order, the case was mentioned again.

Mr. *R. Palmer* and Mr. *Cotton* for the Bank of *England*.

It is the duty of the Bank of *England* to see that the person calling on them to transfer a fund standing in their books in the name of another person has a good right and title to have the transfer made to him. This order, on the face of it, shews that the case is not within the powers given by "The Trustee Act, 1850" (13 & 14 *Vict.* c. 60). It is made on the allegation that "there is no legal personal representative of" the surviving



surviving trustee. The act gives no authority to the Court in such cases. The 22nd section applies to a person jointly entitled with another out of the jurisdiction; the 23rd to the case of a sole trustee neglecting or refusing to transfer; the 24th to one of several trustees neglecting or refusing; and the 25th to the case where stock is standing in the sole name of a deceased person, and his personal representative happens to be out of the jurisdiction, or it be uncertain whether he be living, or if refuses to transfer. The case of there being no legal personal representative is not provided for.

1857.  
  
*Re*  
 ELLIS'  
 Settlement.

The appointment of new trustees was out of Court, and not under the 32nd section, and, therefore, the remaining section, the 35th section, is also inapplicable.

The facts bringing the case within the act should appear on the face of the order, as the Bank cannot travel out of the order itself.

Mr. C. T. Simpson, *contra*, argued, that by the Trustee Extension Act, 1852 (15 & 16 Vict. c. 55, s. 6), the Bank were bound to obey the order, and that the 7th section gave a complete indemnity, and rendered it unnecessary for them to inquire concerning the propriety of the order. He stated, that the legal personal representative of the surviving trustee had not proved the will, but that she had neglected to transfer according to the direction of the new trustees for more than twenty-eight days, and that, therefore, the case came clearly within the cases of *Ex parte Winter* (a), and *Ex parte Haggard* (b), in which Lord Lyndhurst and Lord

(a) 5 Russ. 284.

(b) 1 Beav. 98.

1857.  
 Re  
 ELLIS'  
 Settlement.

Lord *Langdale* had decided that a person so situated was a legal personal representative within the 7 *Geo.* 4, c. 74, s. 7, and the 1 *Will.* 4, c. 60, s. 10.

*The MASTER of the ROLLS.*

Let the order be amended by stating that Mrs. *Ellis* has neglected to transfer for the space of twenty-eight days; that will remove all question.

*Re* MICHAEL FOSTER.

Nov. 18.  
 This Court discourages applications in Term for a prohibition, even though the proceeding has originated here in Vacation.

ON the 28th of *July*, after the Common Law Courts had risen, an application was made to the Master of the Rolls for a writ of prohibition, to restrain the Consistorial Court of *Ely* from proceeding in a suit which had been instituted by churchwardens against *Michael Foster* for subtraction of church-rates. It was then ordered, that the motion should stand over until the first seal day of *Michaelmas* Term, and the churchwardens were to be at liberty to enter into evidence by affidavit, serving copies on Mr. *Foster* and his solicitor. No further proceedings were to be taken in the Consistorial Court pending the motion, and both parties undertook not to object to the motion being made and disposed of in Term time, if the Court should not object thereto.

Mr. *Cole* now revived the motion. He argued that Courts of Common Law could not issue this writ in the Vacation, and that the application, which had, of necessity, been originally made to this Court, was now properly continued under the undertaking of and the arrangement between  
 between

between the parties. He referred to 12 & 13 *Vict.* c. 109, ss. 26, 27, 28; [and see the 13 & 14 *Vict.* c. 61, s. 22, and the 19 & 20 *Vict.* c. 108, ss. 40, 41, 42, 43, 44; and *Wright v. Cattell* (a), as to prohibitions to a County Court.]

1857.

Re  
MICHAEL  
FOSTER.

Mr. *R. Palmer* and Mr. *Bristowe*, *contra*, referred to *Montgomery v. Blair* (b), to shew that this Court will not entertain a motion for prohibition in Term time.

The MASTER of the ROLLS said that such applications as the present interfered with the equity business of this Court, and that it would be much better to proceed in a Court of Law, which was more conversant with these questions. He suggested that the parties should take the case to one of the Courts of Common Law, which they, at once, assented to.

(a) 13 *Beav.* 81.

(b) 2 *Sch. & Lef.* 136.

1857.

## WYNNE v. FLETCHER.

July 16.

A clause of forfeiture in case of the devisee not making the mansion house "his usual and common place of abode and residence," is not void for uncertainty.

A testatrix devised an estate to A. for life, with divers remainders over. She provided that A., and every other person who should by her will "become possessed or entitled" to the estate, should make and use the mansion house as his "usual common place of abode and residence," and keep the

same and the garden and demesne lands thereto belonging in a suitable and proper state of repair, condition and cultivation. And in case A., or any other person who should be so possessed or entitled, should refuse or neglect to reside at and make use of the mansion house as his common place of abode and residence, or should wilfully suffer the same to fall into decay, or should convert or alter the garden or demesne lands to other purposes than those for which the same were then used and occupied, unless with the express consent of his trustees, then the limitation in his favour should cease. Held, that the trustees could not dispense with the condition as regarded residence, their power being limited to the case of an alteration of the garden and demesne lands.

Whether, under such a condition, upon a forfeiture happening, the person next in remainder is bound to enter and reside, or can waive the forfeiture without himself forfeiting his own estate, *quære*.

**T**HIS was a special case which stated as follows:—

*Elizabeth Giffard*, by her will, dated the 17th day of *January*, 1837, devised her residence called *Nerquis Hall*, and all her messuages, tenements and hereditaments, and other her estate, in the county of *Flint*, usually called the *Nerquis* estate, unto *Frederick Charles Phillips* (deceased), *Philip Humberston* (deceased), and the Defendant *Philip Stapleton Humberston*, their heirs and assigns, upon the trusts therein mentioned for the payment of the interest on certain debts, charges and expenses, and subject thereto, she devised her said estate of *Nerquis Hall* and other estates to the use of the Plaintiff *Lloyd Wynne* for life, without impeachment of waste as to the estates in general, but impeachable of waste as to *Nerquis Hall*, buildings, gardens and demesne, with remainder to the use of the trustees and their heirs during the life of the Plaintiff *Lloyd Wynne*, with remainder to the use of the first, second

second and other sons of the Plaintiff *Lloyd Wynne* and their issue in tail male, with remainder to the use of the Defendant *Phillips Lloyd Fletcher* for life, without impeachment of waste except as hereinbefore excepted, with divers remainders over.

1857.

WYNNE  
v.  
FLETCHER.

The testatrix then declared as follows :—"That *Lloyd Wynne*, and every other person and persons who shall, by virtue of this my will, become possessed of or entitled to my said capital messuage or mansion house called *Nerquis Hall*, and the estates therewith devised, in manner hereinbefore mentioned, shall, from the time he or she or they become so possessed or entitled, make and use my aforesaid mansion house called *Nerquis Hall* as his, her or their *usual and common place of abode and residence*, and keep the same and the garden and demesne lands thereto belonging in a suitable and proper state of repair, condition and cultivation. And in case *Lloyd Wynne* or any other person who shall be so possessed or entitled shall refuse or neglect to reside at and make use of my aforesaid mansion house as his, her or their common place of abode and residence, or shall wilfully suffer the same to fall into decay, or shall convert or alter the garden or demesne lands to other purposes than those for which the same are now used and occupied, *unless with the express consent, in writing, of my said trustees for the time being*, then and in such case the limitation hereinbefore contained in favour of such person who shall so refuse or neglect to reside in my said mansion house called *Nerquis Hall* shall cease, determine and be utterly void, and the said mansion house, and all other messuages, lands, tenements and hereditaments hereinbefore demised with the same mansion house, shall go to the person next entitled in remainder under the devise and limitation hereinbefore contained, as if such person whose estate shall so cease

1857.  
WYNNE  
v.  
FLETCHER.

was actually dead (except as next hereinafter mentioned), but without prejudice to any lease or exchange which previously to such cesser or determination shall have been made or effected by virtue of the powers for that purpose hereinafter contained.

Provided nevertheless and I hereby further declare, that in case any tenant for life under this my will shall have another residence of his own, and shall place one of his or her children at my said residence called *Nerquis Hall*, and that child shall make it his or her common place of abode, with a suitable establishment of servants to keep up the place, and shall keep up the place in the state required by the last proviso, then the condition last hereinbefore made shall be considered fully complied with, and no forfeiture shall be incurred.

And further, in case the said *Lloyd Wynne*, or any other tenant for life, shall wish to have the hothouses and greenhouses, or any part of them, removed, it shall and may be lawful to and for my said trustees for the time being, upon receiving a request in writing for the purpose, to take down and remove the same hothouses and greenhouses, or any part of them, and to sell the materials thereof, and add the produce to the trusts hereinafter mentioned for the liquidation of my debts.

There was a power for the tenants for life in possession to grant leases of the hereditaments for agricultural purposes, save and except the mansion house called *Nerquis Hall*, and the gardens, pleasure grounds and demesne lands thereto belonging.

The testatrix died in 1842.

*Lloyd Wynne*, the first devisee for life, was desirous of being relieved from the obligation to continue to fulfil  
the

the conditions imposed by the will, and the trustee was willing to consent (so far as he lawfully had power to do) to the nonperformance of such conditions, except as to the repairs of the said mansion house and premises called *Nerquis Hall*, and *Phillips Lloyd Fletcher* (who was, at present, the person next in remainder) was likewise willing to consent to the nonperformance of such conditions (except as aforesaid) by *Lloyd Wynne* and to waive any advantage which he might be entitled to take thereof by way of forfeiture or otherwise, unless by so doing he would become liable to forfeit his own life estate in remainder expectant upon the determination of the life estate of *Lloyd*.

1857.  
  
 WYNNE  
 v.  
 FLETCHER.

The following questions were submitted for the opinion of the Court:—

1. Whether the trustee had power, by his express consent in writing, to dispense with the performance by *Lloyd Wynne* of all or of any of the conditions annexed to the devise of the mansion house called *Nerquis Hall*, and the estates therewith devised.

2. Whether, in the event of any default being made by *Lloyd Wynne* in the performance of the conditions, it would be incumbent on *Phillips Lloyd Fletcher* to enter on pain of forfeiting his life estate in remainder; or whether it would be competent for him, without forfeiting his life estate, to waive any forfeiture.

Mr. *Reginald Walpole* (in the absence of Mr. *R. Palmer*) argued, that the trustee might dispense with the condition imposed on the tenant for life, of making *Nerquis Hall* his “usual and common place of abode and residence.” That conditions of forfeiture were always construed strictly, and that the present condition was void  
 for

1857.  
  
 WYNNE  
 v.  
 FLETCHER.

for uncertainty. He cited *Gainsford v. Griffith* (a); *Fraunces's Case* (b); *Fillingham v. Bromley* (c); *Walcot v. Botfield* (d); *Dunne v. Dunne* (e).

Mr. *Follett* and Mr. *C. Hall* for the trustee.

Mr. *Selwyn* for *Phillips Lloyd Fletcher*.

*The MASTER of the ROLLS*, without hearing the Respondents, held, that the power of dispensation given to the trustees did not extend to dispensing with the residence of the tenant for life, the power being, in his opinion, limited to the condition, against converting or altering the garden or demesne lands to other purposes than those for which the same were then used and occupied.

He also held, that the condition was a valid condition.

But he expressed no opinion on the second question.

(a) 1 *Saund.* 58.

(b) 8 *Rep.* 89b.

(c) *Turn. & Russ.* 530.

(d) 1 *Kay*, 534.

(e) 3 *Sm. & Gif.* 22, and 1  
*Jur. N. S.* 1056.



1857.

## O'CONNER v. SIERRA NEVADA COMPANY.

THE bill was filed on the 6th of *November*, 1856, relating to a mine in *California*. On the 31st of *January*, 1857, the Plaintiff went to *California* on matters connected with the suit, and on the 25th of *February* following he was ordered to give security for costs. Two months afterwards (23rd *April*, 1857), the Defendant moved that the security might be given within a limited time, or, in default, that the bill might be discharged with costs. The Master of the Rolls considered the motion premature, and ordered it to stand over (a).

Nov. 18.  
A Plaintiff, having gone abroad on matters connected with the suit, was ordered to give security for costs, but having returned to this country the order was discharged.

On the 27th of *October*, the Defendant gave notice that he would renew the motion, but the Plaintiff returned to this country on the 14th of *November*, before the motion had been brought on.

Mr. *Rodwell* now moved.

Mr. *Hobhouse*, *contra*, asked for the costs.

*The MASTER of the ROLLS.*

I am of opinion that the Defendant must pay the costs of this motion ; it was premature.

Mr. *Hobhouse* asked, that, as the Plaintiff was now resident in this country, the order for security for costs might be discharged.

*The*

(a) 23 *Beav.* 608.

1857.

*The MASTER of the ROLLS.*

O'CONNER  
v.  
SIERRA  
NEVADA  
COMPANY.

If notice of motion had been given, I should make the order, on the facts now before me.

Mr. *Rodwell* waived the notice of motion, and the order was made.

## KNIGHT v. POCOCK.

Nov. 14.

In a suit by a first mortgagee a sale was directed. The subsequent judgment creditors of the mortgagor were not parties. On an objection by a purchaser under the decree, Held, that the judgment creditors were not bound by the proceedings, and liberty was given to bring them before the Court.

**POCOCK** had, in the first place, mortgaged his real estate to the Plaintiff *Knight*, who obtained the legal estate. He afterwards mortgaged it to *Bolton*, a Defendant, and he had then assigned his property to two trustees for his creditors. In this suit, instituted by the first mortgagee, a decree had been made for the sale of the property. One of the purchasers objected to the title, on the ground that there were eight registered judgment creditors against *Pocock*, the mortgagor, who were not parties to the suit. They had, however, been served with notice of the decree, and some of them had appeared, but others had not appeared, and they refused to enter up satisfaction. They had not acceded to the creditors' deed.

The mortgagor had executed a creditors' deed, but the judgment creditors had not acceded to it. Held, that the trustees of the deed did not represent them under the 15 & 16 Vict. c. 86, s. 42, r. 9.

Mr. *R. Palmer* for the Plaintiff. The judgment creditors are sufficiently bound by the proceedings in the suit ; and, independently of the Acts of Parliament, the Court is able to give the purchaser a good title, by means of the legal estate vested in the Plaintiff, for the subsequent judgments can only affect a purchaser through the assistance of this Court, which would not be afforded on behalf of the judgment creditors in such a case.

Under

Under the 15 & 16 *Vict.* c. 86 (a), the Court has authority to direct a sale of the estate, and under another section (b) the trustees of the creditors' deed represent the *cestuis que trust*.

1857.

KNIGHT  
v.  
POCOCK.

Mr. *Pole, contra*. The case of *The Governors of the Grey Coat Hospital v. The Westminster Improvement Commissioners* (c) governs the present. There "A. agreed to sell land to B., who accepted the title, paid part of his purchase-money and was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property and payment of the balance of purchase-money out of the proceeds. It was held, that a purchaser under the decree could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, and who were not parties to the suit." The objection in that case created so much difficulty, that, at the suggestion of the Court, it was arranged between the parties that an order should be taken for discharging the purchaser.

The service of the decree on the judgment creditors, in this case, was wholly inoperative, for unless the case comes within the act and the statute applies (which it clearly does not), the proceeding is a nullity.

Mr. *Westlake* for other parties.

The MASTER of the ROLLS was of opinion that the judgment creditors, not being parties, were not bound by the decree unless they came in under and submitted to

(a) Sect. 48.

(c) 1 *De G. & J.* 531.

(b) Sect. 42, rule 9.

1857.

KNIGHT

v.

POCOCK.

to it, in which case he said he had no doubt that they would be fully bound by it. He gave the Plaintiff an opportunity of giving notice to the judgment creditors, who might possibly find it to their interest to come in under the decree, but if they should not, he then gave the Plaintiff liberty to file a supplemental bill against them.

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TRACY v. BUTCHER.


Dec. 4, 5.

The testator directed the interest of his residue to be applied to the maintenance and support of his son and his son's wife and children, and after the death of the survivor of his son and wife, he directed such interest to be applied, by his executors, in the support of and bringing up the child or children of his son during their minority or minorities, and as they severally attained the age of twenty-one years, he gave and be-

queathed the share of each child to be paid to her or him, and in case only one of such children should live to attain the age of twenty-one years, then he gave the whole to such one child absolutely. Held, that the gift to the children was contingent on their attaining twenty-one.

THE testator bequeathed his residuary personal estate to his executors, upon the following trusts: —“ Upon trust to carry on my farming business, if they think proper so to do, and in that case, to apply the profits or advantages arising therefrom in maintaining my son *William*, his wife *Mary Ann*, and in bringing up the child or children of my son *William* during his, her or their minority or minorities. And I direct that the said profits or otherwise as aforesaid be paid by half-yearly payments unto the said *Mary Ann*, the wife of my said son, to be by her applied as is before directed. And further, I give power to my said executors to put off my said farming business at any time they think fit, and in such case I do direct that all my personal estate of every description be sold and brought into ready money, in such way and manner as my said executors shall think proper, and the produce of such sale as aforesaid, (all expenses incurred thereby being

being first thereout deducted and paid,) I direct be placed out at interest by my said executors or the survivor of them, and such interest I direct to be applied for the maintenance and support of my said son *William Mays*, his said wife and child or children, during the joint lives of my said son and his said wife and the life of the survivor of them; and I direct that such interest be paid to her the said *Mary Ann Mays*, as the same is received, to be applied by her as aforesaid. And from and after the decease of the survivor of them my said son *William* and his said wife *Mary Ann*, I direct such interest to be applied by my said executors in the support of and bringing up the said child or children of my said son during their minority or minorities, *and as they severally attain the age of twenty-one years, I give and bequeath the share of each child to be paid to her or him, and in case only one of such children shall live to attain the age of twenty-one years, then I give the whole to such one child absolutely.*"

1857.  
  
 TRACY  
 v.  
 BUTCHER.

The testator died in 1840, his son *William* in 1841, and the son's wife, *Mary Ann*, in 1854.

The son *William* had one child only, a daughter, who died in 1848, under twenty-one, and unmarried, and the Plaintiff was her legal personal representative.

The Defendants insisted and contended that as *Mary Ann Mays*, the daughter, died under the age of twenty-one years, she did not take any vested interest under the testator's will in the principal or *corpus* of his residuary personal estate, whereas the Plaintiffs contended and insisted that she did take a vested interest therein, although she died under the age of twenty-one years.

Mr.

1857.

TRACY  
v.  
BUTCHER.

Mr. *R. Palmer* and Mr. *Ffooks* for the Plaintiff.

The testator, after directing the residue to be placed out at interest in the names of his executors, and disposing of the income of such fund during the lives of his son and daughter in law, and the survivor of them, directs that upon the death of the survivor the whole income shall be applied in the maintenance of their children during their minority, and on the attainment of twenty-one by each child he says, "I give and bequeath the share of each child to be paid to her or him. This brings the case within the principle of interpretation established by *Fonereau v. Fonereau* (a); *Hoath v. Hoath* (b); *Booth v. Booth* (c); *Hanson v. Graham* (d); *Saunders v. Vautier* (e), and other authorities, which establish that the gift for maintenance of the intermediate interest vests the legacy.

Mr. *Selwyn* and Mr. *Baggallay*, *contra*. We admit that a general gift of the intermediate interest vests the legacy, but here there is no gift except in the direction to pay, and therefore the legacy is not vested. But the last sentence is conclusive, "And in case any one of such children shall live to attain the age of twenty-one, then I give the whole to such one child absolutely." This is quite inconsistent with the other children taking vested interests during their infancy, and it would be superfluous in the present case, if the only child took a vested interest at her birth. This case, therefore, is not brought within the authorities.

The Plaintiff has no interest. First, there is no gift except in the direction to pay at twenty-one; *Leake v. Robinson* (f). Secondly, there is no direct gift of the intermediate

(a) 3 *Atk.* 645.

(b) 2 *B. C. C.* 4.

(c) 4 *Ves.* 399.

(d) 6 *Ves.* 239.

(e) *Cr. & Phil.* 240.

(f) 2 *Mer.* 363.

intermediate income, for it is always coupled with benefits to other persons during the life of the father and mother. And, thirdly, the last clause shews that an absolute interest is only given to such as shall attain twenty-one.

1857.

TRACY  
v.  
BUTCHER.

Mr. *Ffooks*, in reply, argued, in addition, that the Court always leans against intestacy in construing residuary gifts; *Booth v. Booth* (a).

*The MASTER of the ROLLS* : I will look at the cases.

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*The MASTER of the ROLLS* was of opinion that the gift to the children did not vest until they attain twenty-one, and dismissed the bill.

Dec. 5.

(a) 4 *Ves.* 399.

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1857.

*In re GOULD.**In re The 57 GEO. III. c. xxix.*

Nov. 24.

An act, enabling a public body to take lands compulsorily, directed that in cases of disability, the purchase-money should be paid into Court and laid out in the purchase of other hereditaments, and that in the meantime it should be invested in Consols and the dividends paid to the persons entitled. The act authorized the Court to order "the expenses of all purchases from time to time to be made in pursuance of the Act" to be paid by the public body. Held, that the costs of the interim investment in Consols, and of the order to pay the dividends to the tenant for life, must be borne by the fund, and not by the public body.

**B**Y the 57 *Geo. 3, c. xxix*, the Commissioners of Sewers of the Metropolis have power to take lands for the purpose of widening streets (a).

By the 84th section, where the owners are under disability, the purchase-money is to be paid into Court, and applied in the purchase of other hereditaments, "and in the meantime and until such purchase shall be made, the said money shall, by order of the Court of Chancery, upon application thereto, be invested by the said Accountant-General, in his name, in the purchase of £3 per Centum Consolidated, or £3 per Centum Reduced Bank Annuities, and in the meantime and until the said Bank Annuities shall be ordered by the said Court to be sold for the purposes aforesaid, the dividends and annual produce of the said Consolidated or Reduced Bank Annuities shall, from time to time, be paid, by order of the said Court, to the person or persons who would, for the time being, have been entitled to the rents and profits of the said lands, buildings, tenements and hereditaments so hereby directed to be purchased in case such purchase or settlement were made."

The 89th section is as follows:—

"Provided also, and be it further enacted, that where, by reason of any disability or incapacity of the person  
or

(a) Sects. 80, 81, 82, 83.



or persons or corporation entitled to any lands, tenements or hereditaments to be purchased, or purchased under the authority of this act, the purchase-money for the same shall be required to be paid into the Court of Chancery, and to be applied in the purchase of other lands, tenements or hereditaments, to be settled to the like uses, in pursuance of this act, it shall be lawful for the said Court of Chancery to order *the expenses of all purchases* from time to time to be made in pursuance of this act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said commissioners or trustees or other persons as aforesaid, who shall from time to time pay such sums of money for such purposes as the said Court shall direct."

1857.

*In re*  
GOULD.

In *April*, 1857, the commissioners, under these powers, purchased two houses in *Chancery Lane*, which were subject to a settlement, for 3,500*l.* They paid the amount into Court, and the property had been conveyed to them.

The tenants for life and the trustees now presented a petition which stated that no proper investment or other suitable hereditaments had as yet been found for the 3,500*l.* It prayed that it might be invested in Consols, and that the dividends might be paid to the trustees of the settlement, and that the Commissioners of Sewers might be ordered to pay the costs and expenses incurred by the trustees in and about the purchase of the hereditaments, and the costs of all the Petitioners in respect of and consequent on that application, and the investment of the said sum in Bank 3*l.* per Centum Annuities.

The only question was as to the costs of the application and of the investment in stock, the payment of which

1857.

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*In re*  
GOULD.

which the commissioners resisted, on the ground that this was an *interim* arrangement permitted by the act for the benefit of the Petitioners alone.

Mr. *Beaumont*, for the Petitioners, referred to the 84th and 89th sections of the act, and argued that the former section clearly brought the present proceedings within the latter, whereby it is declared that "it shall be lawful for the Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of this act to be paid by the commissioners."

Mr. *Millar*, for the Commissioners of Sewers, was not called on.

*The MASTER of the ROLLS* was of opinion, that, upon the true construction of this act, he had no jurisdiction to fix the Commissioners of Sewers with the costs of this proceeding. That the commissioners must pay the reasonable expenses of the purchase of the premises by them, but that the other costs of the Petitioners must come out of the fund.

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1857.

COWDRAY v. CROSS.

Nov. 14.

UPON an attachment for non-performance of a decree, the sheriff had returned that he had taken bail.

The sheriff having taken bail upon an attachment, in a case not bailable, the Court directed a messenger to go.

A motion was now made for a messenger.

Mr. *Lewis* in support of the motion. The sheriff had no authority to take bail, and it appears from *Anonymous (a)*, that the proper course is to direct a messenger to go.

The MASTER of the ROLLS made the order.

EARLE v. BELLINGHAM. (No. 1.)

July 24.

THE testator bequeathed to two trustees the sum of 7,000*l.*, upon trust to invest it in the public stock or funds, or upon Government or real securities, at interest, and "yearly and every year during the natural life of his wife *Caroline* to pay, apply and dispose of the sum of 300*l.*, *part of the dividends, interest and annual produce of the said sum of 7,000*l.**, and of the stocks, funds and securities wherein or upon which the same" should be invested, "when and as the same should or might be received," free of taxes, for the separate use of his wife. "And as to, for and concern-

An annuity held payable out of the interest only of a fund, and not out of the *corpus*, and to fail upon a deficiency of the income.

ing

(a) *Proc. Ch.* 331.

1857.

EARLE

v.

BELLINGHAM.

ing the residue of the dividends, interest and annual produce of the said sum of 7,000*l.*," during his wife's life, upon certain trusts for the maintenance, &c. of his children. "And from and immediately after his wife's death, upon trust to apply the dividends, interest and annual produce of the said sum of 7,000*l.*," and of the stocks, &c., for the maintenance, &c., of his children, and when they attained twenty-one, to transfer to them the said sum of 7,000*l.*, with the dividends not applied to their maintenance. But in case he should die without children (which happened), upon trust to pay, &c., "the said sum of 7,000*l.*, with the dividends, &c., to his sister *Mary Cooper*."

He directed that if the dividends, &c., of the 7,000*l.* "should, from any unforeseen event," be insufficient, at any period during his wife's life, to satisfy her annuity, then such deficiency should be made up out of the dividends, &c., of his residue; it being his intent and meaning, that his wife should receive, yearly and every year, during her life, a clear annual sum of 300*l.*, without any deduction whatsoever.

The testator died without issue in 1814. The 7,000*l.* was duly invested, but the fund had, by breach of trust, become reduced to 4,198*l.* Consols, the dividends of which were insufficient to pay the widow's annuity. She received the dividends and died in 1855, having received much less than 300*l.* a year.

Her executors now claimed to have the arrears of the annuity paid out of the *corpus* of the trust fund.

Mr. *Follett* and Mr. *W. W. Cooper* for the Plaintiff, argued that the income during the life of the widow  
was

was alone liable for her annuity. They cited *Hindle v. Taylor* (a), and *Foster v. Smith* (b). 1857.

EARLE  
v.  
BELLINGHAM.

Mr. Selwyn and Mr. Karslake cited *Torre v. Brown* (c).

Mr. Speed for the executors of the widow, argued that the *corpus* of the 7,000*l.* was liable to pay the annuity, for that an indefinite charge on the income constituted a charge on the *corpus*. He relied on *Wroughton v. Colquhoun* (d); *Wright v. Callender* (e); *Ingleman v. Worthington* (f); *Baker v. Baker* (g); *Mills v. Drewitt* (h).

*The MASTER of the ROLLS.*

I think the *corpus* is not charged. The distinction which appears to exist between the cases last referred to and the present, and the view I took, are expressed in the passage which was read from *Mills v. Drewitt* (i). In that case the primary object was to pay the annuity, and a sufficient sum was to be invested for that purpose, and I thought that if the income was not sufficient the *corpus* was liable. But here the direction is, that 7,000*l.* shall be invested, and out of the dividend the widow is to be paid 300*l.* a year, and the fund itself is given over after her death.

I find a great difficulty in distinguishing this from *Foster v. Smith*; not only is there a direction that the annuity should be paid out of dividends, but the capital on the death of the annuitant is to be applied in a different manner.

The

(a) 20 *Beav.* 109.

(b) 1 *Phill.* 629.

(c) 5 *H. L. Cas.* 555.

(d) 1 *De G. & Sm.* 36.

(e) 2 *De G., M. & G.* 652.

(f) 1 *Jur. N. S.* 1062.

(g) 20 *Beav.* 548, since reversed by the House of Lords.

(h) 20 *Beav.* 632.

(i) 20 *Beav.* p. 636.

1857.

EARLE  
v.

BELLINGHAM.

The residuary gift rather confirms this view, because the testator, anticipating the possibility of a deficiency of the income of the 7,000*l.*, gives the income of another fund to make it good. If he had considered the capital liable, he would not thus have given the income of an auxiliary fund. I am of opinion that this case is governed by *Foster v. Smith*, and that the *corpus* is not liable for the arrears.

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EARLE v. BELLINGHAM. (No. 2.)

Nov. 16.

*A. B.* was entitled to 7,000*l.* payable on the death of *C. D.* *A. B.* by her will bequeathed legacies payable out of the 7,000*l.* *C. D.* survived *A. B.* thirty-three years. Held, that the legacies carried interest only from the death of *C. D.*, and not from the death of the testatrix.

THE testator *John Cooper*, by his will, dated in 1806, gave 7,000*l.* to trustees, upon trust (in effect) for his wife for life, and after her death, in the events which happened, for his sister *Mary Cooper*.

He died and his will was proved in 1814.

In 1822, *Mary Cooper*, the testator's sister, made her will, whereby she gave as follows:—"I give and bequeath unto *Elizabeth Nicholas* the sum of one thousand pounds; also I give and bequeath unto *Elizabeth Wake* and *Ann Wake* and *Sarah Oriel* the sum of five hundred pounds to be equally divided between them share and share alike, which said two legacies or sums of one thousand pounds and five hundred pounds I direct to be paid out of the moneys arising out of my reversionary interest in the sum of seven thousand pounds, given and bequeathed to me by the will of my brother *John Cooper* deceased, and which he directed to be payable to me at the death of his wife *Caroline Cooper*. And as to the residue of the said sum of seven thousand pounds I direct it may form part of the residue

residue of my personal estate hereinafter mentioned." She gave the residue of her personal estate unto *John, William, James and Mary Cooper* equally.

1857.  
EARLE  
v.  
BELLINGHAM.

*Mary Cooper* died in 1822, in the lifetime of the testator's widow, who lived until 1855.

The Plaintiffs claimed to have inserted in the decree a direction for payment of the legacies of 1,000*l.* and 500*l.* with interest from the death of *Mary Cooper*, a period of about thirty-three years.

Mr. *Follett* and Mr. *W. W. Cooper* argued that the legacies were vested at the death of the testatrix, and carried interest from twelve months after the testatrix's death. That they were demonstrative legacies, due and vested at the death, but that the payment of them was postponed, by reason of the reversionary nature of the fund out of which they were payable.

The following cases were referred to :—*Lloyd v. Williams* (a); *Wilcox v. Rhodes* (b); *Pearson v. Pearson* (c); 3 & 4 *Will.* 4, c. 27 (d); *Phillipo v. Munings* (e).

Mr. *R. Palmer* and Mr. *Speed*, *contrà*, were not heard.

*The MASTER of the ROLLS.*

I think that the Statute of Limitations places the Plaintiff in a difficulty, from which there is no possibility of escaping. Time runs from the period at which the right to receive the legacy accrued. The right to a legacy

(a) 2 *Atk.* 109.  
(b) 2 *Russ.* 452.  
(c) 1 *Sch. & Lef.* 12.

(d) Sects. 40, 42.  
(e) 2 *Myl. & Cr.* 309.

1857.

  
EARLE  
v.  
BELLINGHAM.

legacy and the right to receive it is quite a different thing. The right to a legacy ordinarily accrues on the death of the testator, but the right to receive it does not arise until twelve months after his death. There are many cases in which legacies are vested, but no right to receive them exists until a future period, as at twenty-one, or marriage, and, unless there is a particular relation between the testator and legatee, no interest is payable in the meantime, interest being payable only from the time the legacy is receivable.

The statute is a bar to the recovery of a legacy twenty years "after a present right to receive the same shall have accrued;" and my opinion is, that the period from which interest is payable and from which the statute runs is identical, namely, the time when the right to receive accrues.

It would be unfortunate if it were established, that these legatees had a present right to receive their legacies twelve months after the death of the testatrix, for that would make the statute applicable to this case.

My opinion is, that the payment of the legacies is postponed until the reversion fell in, and that interest does not run until the legacies were payable, which was on the death of the widow.



1857.

ALSOP v. BELL.

Dec. 11, 12,  
14, 19.

**THOMAS BAINBRIGGE** made a will, dated August 15, 1815, and thereby devised to his sister, *Ann James*, and to his friends *William Hall* and *James Blair*, their heirs, executors, administrators and assigns, certain real estate in *Staffordshire*, and all his personal estate,

The right to revive an administration suit after decree is not barred by lapse of time, but the Court exercises a discretion, and in

cases of gross negligence or laches may refuse to allow the suit to be revived.

Parties in remainder held not bound by the proceedings in a suit to which the prior tenant in tail was a party, he having no interest to protect, and not having protected the interests of such remaindermen.

A testator made two wills, one in 1815 and the other in 1818; under both *A. B.* (an infant) was first tenant in tail, but the first tenant in remainder was *Thomas* under the first and *William* under the second will. In a suit against the tenant in tail, the heir and *William* the second will was established. *A. B.* died an infant, and without issue. Held, that though the inheritance was represented in the suit, *Thomas* was not bound by the decree, the suit expressly negating his right, and he not being a party thereto.

Where a decree to establish a will against the heir, and for administration of the real and personal estate under it, had been made in 1835, and actively prosecuted down to 1845, and the further prosecution of it had then been interrupted by the institution of an ejectment suit by a person claiming as tenant in tail under a prior will, who afterwards compromised such claim in 1851 by giving 25,000*l.* for the estate: Held, that an original bill, in the nature of a supplemental bill, filed against him in May, 1855, for the purpose of reviving and carrying on the prior suit for administration of the estate, was not barred by lapse of time. Held also, that notwithstanding the ejectment suit had been abandoned as against the Plaintiff in the bill of revivor, who was a Defendant to it, the Court would not revive the decree in the administration suit, so far as it established and sought to carry out the trusts of the later will, without directing an issue to try the validity of that will. But that, upon the Plaintiff in the bill of revivor consenting to admit, for the purposes of that suit, that the prior will was the last will, the Court would revive the administration decree, so far as it sought administration simply without reference to either will.

Where debts of a testator had been paid out of the income of the estate of an infant tenant in tail under his will, by the direction of the Court, after decree in an administration suit, and the tenant in tail subsequently died an infant, and his administrators, more than six years after taking out administration to him, filed a bill to revive the administration suit, for the purpose of having such payments recouped out of the corpus of the estate, and for payment of the costs of the administration suit: Held, first, that the payment, on behalf of the infant, having been made by the Court, a merger of the charge could not be presumed; and, secondly, that the pendency of the suit prevented such claim being barred by lapse of time.

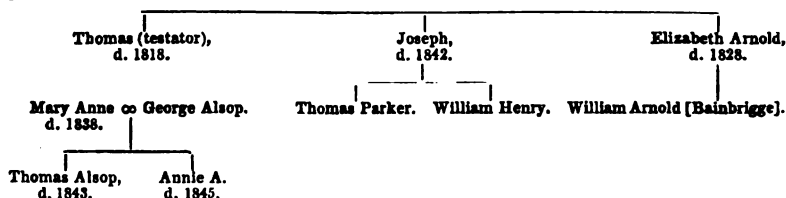
A testator devised part of his real estate in trust for sale to pay his debts "and the costs and charges of proving and attending the execution of his will and the several trusts therein contained," Held, that the costs of an administration suit were charged upon this estate.

1857.

ALSOPT  
v.  
BELL.

estate, upon trust to sell and to receive the moneys thereby arising, and the rents, issues and profits of the said tenements, hereditaments, estates and premises until actual sale, and to apply the same in the first place to pay his debts, funeral expenses and the costs and charges of proving and attending the execution of his will, and the several trusts therein contained, and in the next place to pay certain legacies and annuities bequeathed by him, and to complete certain purchases, and to pay or retain such annuity as therein mentioned for the maintenance and education of *Mary Anne Alsop Bainbrigge*, until she should attain the age of twenty-one years, or be married before that time, with such consent as thereafter mentioned; and upon further trust to pay certain expenses incident to the management of the said estates, and to invest the surplus rents, issues and profits of his said last-mentioned real estates, and also the surplus (if any), subject to the trusts aforesaid, of the moneys arising from the sale of his real or personal estates above directed to be sold in the purchase of other real estate as therein mentioned; and upon further trust that his said trustees should (subject as therein mentioned), from and immediately after the said *Mary Anne Alsop Bainbrigge* should have attained the age of twenty-one years, or be married with such consent as aforesaid, stand possessed of the whole of said testator's property, upon trust for the said *Mary Anne Alsop Bainbrigge* for her separate use for life,

NOTE.—The following diagram will assist in explaining the interests of the different parties:—



life, without power of anticipation; and after her death, upon trust for her first and other sons successively in tail, and in default of such issue, upon trust for her daughters as tenants in common in tail; and if there should be but one such daughter, then upon trust for such only daughter in tail; and for default of such issue, upon trust for the said testator's nephew, *Thomas Parker Bainbrigge*, eldest son of the testator's brother, *Joseph Bainbrigge*, in tail; and in default of such issue, upon trust for the second son of the testator's brother *Joseph* in tail lawfully issuing, and in default of such issue, upon the trusts therein mentioned. And the testator appointed *Ann James William Hall* and *James Blair* executrix and executors of his will.

The testator made a codicil to his will of the same date, which did not revoke or materially alter his will; and he subsequently made a second codicil, dated the 17th day of *June*, 1818, which did materially alter his will and former codicil.

The next day he made his last will, dated the 18th day of *June*, 1818, and thereby he first devised to *James Blair*, *Robert Wood* and *John Hawthorn*, their heirs, executors, administrators and assigns, all the real estate first devised in his former will, and also his real estates in *Derby*, and all his personal estate, upon trust to sell, and out of the proceeds thereof to pay his debts, funeral expenses, and the costs and charges of proving and attending the execution of his will and the several trusts therein contained, and his legacies; and all other his real estate the said testator gave and devised to *James Blair*, *Robert Wood* and *John Hawthorn*, their heirs and assigns, upon trust, out of the rents, issues and profits of his real estate lastly thereby devised to them, or out of any other moneys which should come to their hands under or by virtue of the trusts of the now  
stating

1857.

ALSO  
v.  
BELL.

1857.

ALSOPI  
v.  
BELL.

stating will, to pay certain annuities and legacies to *Elizabeth Arnold* and her children; and subject thereto, and to certain trusts for management of the said property and for maintenance of *Mary Anne Alsop Bainbrigg* during her minority, upon trust to invest the surplus rents and also the surplus (if any), subject to the trusts aforesaid of the moneys arising from the sale of his real and personal estates above directed to be sold, in the purchase of freehold or copyhold hereditaments; and subject as aforesaid, as to all his said real estate, upon trust for *Mary Anne Alsop Bainbrigg*, after she should have attained twenty-one, for her life, for her separate use without power of anticipation; and subject thereto, upon trust for her first and other sons in tail; and subject thereto, for her daughters or daughter in tail; and for default of such issue, upon trust to raise and pay to each and every of the children of *Elizabeth Arnold* then already born or thereafter to be born, and whether begotten or born in the testator's lifetime or after his decease, the further sum of 1,000*l.* a piece, the same to be paid to them respectively when and so soon after the decease of the said *Mary Anne Alsop Bainbrigg*, and failure of issue of her body, as they respectively should attain the age of twenty-one years; and the interest thereof in the meantime, and from and after the decease of *Mary Anne Alsop Bainbrigg* and failure of issue of her body, to be applied by the testator's trustees in, for or towards their maintenance, education or other use or benefit respectively; and subject as aforesaid, upon trust for the first son of the body of *Elizabeth Arnold* lawfully begotten or to be begotten, and the heirs of his body lawfully issuing; and in default of such issue, upon the further trusts therein mentioned. The testator appointed *James Blair*, *Robert Wood* and *John Hawthorn* executors of his said will.

The

The testator died on the 20th of *June*, 1818; his brother *Joseph*, mentioned in his will, was his heir at law.

1857.

ALSOB  
v.  
BELL.

On the 17th of *July*, 1825, *Mary Ann Alsop Bainbrigg*e, being then an infant, intermarried with *George Alsop*, who took the name of *Bainbrigg*e. She attained twenty-one on the 3rd of *July*, 1830, and subsequently had two children born, namely, *Thomas Alsop Bainbrigg*e and *Annie Adelaide Bainbrigg*e, who were the only issue of her marriage.

*Mary Anne Alsop Bainbrigg*e died in 1838; both her children survived her, and both died infants and unmarried, the survivor, *Annie*, having died on the 14th of *July*, 1845.

A great amount of litigation took place (a) concerning the testator's property after his death, occasioned by a dispute on the part of *Joseph Bainbrigg*e, the heir, or his son, *Thomas Parker Bainbrigg*e, in his name, as to the validity of the testator's last will. In 1829, these parties filed a bill in the name of *Joseph Bainbrigg*e, claiming that *Joseph* was entitled as heir on the ground that the testator had died intestate. This was called in the pleadings suit A. In consequence of this proceeding, a suit called suit B. was instituted in 1830 by the persons claiming under the will of 1818, to perpetuate testimony as to its validity, and a suit called suit C. to establish it; this suit C., on a change of solicitors occurring, was abandoned. On the 29th day of *January*, 1831, *Mary Anne Alsop Bainbrigg*e, by her next friend, filed a bill [suit D.] against *Blair, Wood, Hawthorn*, her

(a) *Bainbridge v. Baddeley*, 9 *Beav.* 538; 10 *Beav.* 35; 12 *Beav.* 152; 13 *Beav.* 355; 2 *Phill.* 705; 3 *Mac. & G.* 413; *Bainbridge v. Blair*, 1 *Beav.* 495; 3 *Beav.* 421; 8 *Beav.* 588; *In re Moss*, 17 *Beav.* 59, 340, 346.

1857.

ALSOPI  
v.  
BELL.

her husband *George Alsop Bainbrigg*, *Thomas Alsop Bainbrigg* (the son of *Mary Anne Alsop Bainbrigg*, and the first tenant in tail under both wills), the heir *Joseph Bainbrigg*, *William Arnold Bainbrigg* (the eldest son of *Elizabeth Arnold*), and other legatees under the last will of 1818 (a), stating the last will and praying that it might be established and the trusts thereof carried into execution under the direction of the Court, and for the usual accounts of the said testator's estate, with certain special directions to charge the trustees and executors of the said last-mentioned will for default and breaches of trust with respect thereto, and for the general administration of the estates of the said testator according to the trusts of the said will. A decree was made in this suit, dated the 17th day of *February*, 1835, and it was thereby declared that the will of the said testator *Thomas Bainbrigg* of the 18th day of *June*, 1818, ought to be established, and the trusts thereof performed and carried into execution, and the same was ordered accordingly, and the usual accounts and inquiries were directed, and also certain special inquiries, and, if necessary for the purposes of the will, then it was ordered that the said estates devised in trust for sale and remaining unsold, or a competent part thereof, should be sold, and further directions and costs were reserved.

This suit D. was continually revived and was actively prosecuted until the death of *Annie Adelaide Bainbrigg*. Upon the occurrence of that event, as will be seen, the devolution of the estate depended upon which of the two testamentary instruments was the last will of the testator. If the will and codicil of 1815, then

*Thomas*

(a) *Thomas Parker Bainbrigg*, will of 1815, was not made a party.  
whose title (if any) was under the

*Thomas Parker Bainbrige* was tenant in tail in possession, but if the will of 1818 was the last will, then *William Arnold Bainbrige*, the eldest son of *Elizabeth Arnold*, and who had assumed the name of *Bainbrige*, was entitled for a like estate.

1857.

ALSO  
v.  
BELL.

*William Arnold Bainbrige* revived the suit D., and was let into possession of the estate, under an order in that suit dated the 9th *December*, 1845.

Thereupon *Thomas Parker Bainbrige*, in 1845, filed an ejectment bill against *William Arnold Bainbrige* and all persons interested under the will of 1818, including the Plaintiff in this suit, and thereby claimed to be entitled (on the ground of the invalidity of that will and the codicil of the day before), as tenant in tail in possession under the will of 1815. The litigation in that suit continued until the month of *April*, 1851, when it was brought to an end by a compromise. This was entered into at the trial of an action of ejectment, which had been directed in the suit D. between *Thomas Parker Bainbrige* and *William Arnold Bainbrige*, in order to ascertain which was the last will of the testator, a question which in consequence of the compromise had never been judicially decided.

By the terms of the compromise, *Thomas Parker Bainbrige* was to have the estate discharged of all incumbrances created by or through *William Arnold Bainbrige* upon paying to the latter 25,000*l*.

Immediately after such compromise, the parties to suit D. gave notice of their claims for costs incurred in that suit, to *Thomas Parker Bainbrige* and his brother  
*William*

1857.

ALSOPI  
v.  
BELL.

*William Henry Bainbrigge*, to whom he had transferred his interest in the estates, without consideration, in pursuance of a previous agreement between them. At the same time suit D. was registered as a *lis pendens* against these parties.

*John Moss* had acted as solicitor for *Thomas Parker Bainbrigge* in all the aforesaid litigation, and had obtained from his client an agreement to give him a mortgage upon the property for his costs, and he shortly afterwards commenced a suit to realise this security, which was carried on until the year 1855.

On the 9th of *May*, 1855, the bill in this suit was filed by the Plaintiff *Susanna Christiana Alsop*, claiming as legal personal representative of *Mary Anne Alsop Bainbrigge* and of her two infant children (the tenant for life and tenants in tail respectively under both the wills), and against all persons interested in the estate or claiming to be so under either of the wills, for the purpose of having a bond debt of the testator for 1,000*l.*, which had been paid under the Order of the Court in suit D. out of the rents which accrued during the life of one of the infant tenants in tail, and also the costs of that suit, raised and paid out of the *corpus* of the estate, and praying that, for that purpose, the present suit might be taken as supplemental to suit D., and that that suit might be revived and carried on against the Defendants, and for consequential relief.

Mr. *Schwyn* and Mr. *Kay* for the Plaintiff.

After decree in an administration suit there is no absolute bar by lapse of time to the right to revive, though the Court, in cases of very great negligence, may refuse  
to



to make the order; *Higgins v. Shaw* (a). But here there was no negligence.

1857.

ALSO  
v.  
BELL.

The decree in suit D. ought now to be revived against *Thomas Parker Bainbrigge* and all claiming under him, without directing any issue to try which was the last will of the testator, for a prior equitable tenant in tail under the will under which *Thomas Parker Bainbrigge* claims was a Defendant to suit D., and it would have been improper to make *Thomas Parker Bainbrigge* himself a Defendant; *Lloyd v. Johnes* (b). Moreover the trustees and executors of the will of 1818 have been in possession for nearly forty years, and the Court will not now permit *Thomas Parker Bainbrigge* to question the validity of any of their acts, or to say that any administration suit by them was so improper, that the costs of it cannot be recovered out of the estate. Further, in the ejectment suit *Thomas Parker Bainbrigge* had liberty to bring an action, which he never prosecuted to a decision, and he has since abandoned that suit.

The particular claims made by the Plaintiff are such as give her a full right to file this bill. Debts of the testator have been paid by direction of the Court out of the income of one of the infant tenants in tail, in the suit D., and the tenant for life has had to pay large sums for costs in that litigation. The pendency of that suit necessarily keeps alive the claim to have these payments recouped out of the *corpus*; *Ware v. Polhill* (c); *Roddam v. Morley* (d).

Indeed, part of the estate has been especially devised in trust to sell and pay the costs of the administration suit and the debts of the testator. As to this part of the

(a) 2 *Dru. & War.* 356.

(b) 9 *Ves.* 37.

(c) 11 *Ves.* 257.

(d) 1 *De G. & J.* 1.

## CASES IN CHANCERY.

the estate, there is an express trust for these purposes within 3 & 4 Will. 4, c. 27 (a), and therefore as to this part there can be no bar by lapse of time.

Mr. *Roundell Palmer* and Mr. *Edward Webster* for the Defendant *John Moss*.

The right to revive this suit is barred by lapse of time, or if not, the decree having been made in 1835, the Court, in the exercise of its discretion, will not now revive it.

In any case, it cannot be revived against *Thomas Parker Bainbrigge* and those claiming under him, for they were not parties to the suit D., and this bill, as to them, is altogether an original bill. The suit D. proceeded altogether upon the assumption that the will of 1818 was the last will, and the effect of reviving the decree in that suit would be, to establish that will against the devisees under the earlier will, which cannot be done without giving *Thomas Parker Bainbrigge* an opportunity of trying which was the last will.

The claims made by the Plaintiff in this suit are not sufficient to support this bill. The bond debt paid off by the Court out of the income of the infant tenant in tail was discharged by that payment. If not, the right to be recouped is now founded on a simple contract debt; *Copis v. Middleton* (b); and this bill was not filed until after the expiration of more than six years from the time when the Plaintiff took out administration to the deceased tenant in tail; *Morley v. Morley* (c).

As

(a) Sect. 25.

(b) *Turn. & R.* 224.

(c) 5 *De G., M. & G.* 610.

As to the costs, the claim on that ground would not enable the Plaintiff to revive a suit, nor will it make the costs of an administration suit under that will a charge on the estate, if the suit, for other reasons, could be revived. The charge in the will did not extend to such costs; *Browne v. Groombridge* (a).

1857.

ALSO  
v.  
BELL.

Mr. Follett and Mr. Amphlett, for *Thomas Parker Bainbrigg* and his brother and family, supported the same arguments and cited *Spackman v. Timbrell* (b); *Richardson v. Horton* (c).

Mr. Southgate and Mr. Speed for other parties.

Mr. Kay in reply.

The MASTER of the ROLLS reserved his judgment.

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The MASTER of the ROLLS.

The facts of this case, as far as are material for the purposes of explaining the view I take of it, are very short and simple.

Dec. 19

A testator, *Thomas Bainbrigg*, died in 1818; he left behind him two wills, one dated in 1815, and the other in 1818. So far as the interests of *Mary Anne Alsop Bainbrigg* and her children were concerned the wills were the same, but as regarded legatees, and as regarded the limitation over after the death of *Mary Anne Alsop Bainbrigg* and the failure of her issue, they varied materially; in addition to this, though both wills directed certain property to be sold and the produce to be applied

(a) 4 *Mad.* 495.

(c) 7 *Beav.* 112.

(b) 8 *Sim.* 253.

1857.

ALSOPI  
v.  
BELL.

plied in payment of debts and funeral and testamentary expenses, the later will added some property not devised for this purpose in the former will.

In *January*, 1831, a suit was instituted by *Mary Anne Alsop Bainbrigge* by her next friend for the administration of the estate of the testator. The children of *Mrs. Mary Anne Alsop Bainbrigge*, who were the first tenants in tail under both wills, were made parties to the suit, and if the suit had been confined to the administration of the estate, by clearing it of debts, and had held an even hand between the two wills, both parties would have been bound by all the proceedings in the suit. The Plaintiffs, however, were placed in a situation of considerable embarrassment; they desired that the land directed by the testator to be sold for payment of debts, &c. should be sold accordingly. In order to accomplish this, it was desirable to establish one of the wills against the heir at law; it was necessary either to select one of the two wills for that purpose, or to bring the persons interested in the ultimate estates tail in remainder before the Court, and determine which of the two wills was the valid one, a question which it might reasonably, at that time, have been expected would never come to be agitated. Accordingly, the Plaintiff selected the will last in date as the will on which to proceed, and prayed the establishment of it against the heir at law, and the execution of the trusts of that will. This was accordingly done by a decree of the 17th of *February*, 1835.

Within a period of a little more than seven years and a half, from 1838 to 1845, the tenant for life and both the tenants in tail died, and then, in *July*, 1845, arose the litigation with respect to the validity of the two wills. This litigation was, very wisely, compromised in  
*April*,

*April*, 1851, by an agreement, according to which 25,000*l.* was to be paid to *William Arnold Bainbrigge* out of the estate. It is stated in the affidavits, that this compromise was on the terms of all incumbrances and claims on the estate arising under the will of the testator being satisfied out of this sum. If this had been fully carried into effect, this suit would not have arisen; but four years after, nothing being done towards payment of what was due to the estates of the tenant for life and the two infant tenants in tail, under the will of the testator and under the decree of 1835, this bill was filed, for the purpose of obtaining such payment. In my opinion, the Plaintiff is entitled, as the legal personal representative of these three persons, to the assistance of this Court, for the purpose of enabling her to obtain what is due to her. In fact, that she is so has not been expressly denied, but the arguments which have been addressed to me have been directed to the mode in which that relief ought to be given, and the extent of the relief she is entitled to.

1857.

ALSO  
v.  
BELL.

I concur with the Defendants' argument, that *Thomas Parker Bainbrigge* and *William Henry Bainbrigge* cannot be bound by the proceedings in the suit D. so far as it sought to establish the will of 1818, unless it should appear that the will of 1818 was the last will and binding testamentary instrument of the testator. If it was, then they are bound, because the inheritance was sufficiently represented by the first tenant in tail; but if the will of 1815 was the real will, then I am of opinion that they are not bound by the proceedings in a suit which expressly negatives and disputes their right and title, and to which they were not parties. I think, therefore, that the right to revive that suit against them would depend upon the fact whether the will of 1818 was the last valid will of the testator.

1857.

ALBOP  
v.  
BELL.

It would be inflicting too great a calamity on these parties to insist on the trial of that issue now, with all its corresponding expense and delay, for the purpose of determining a question which would have no other practical bearing than the determination of a right to revive an old suit, as the rights of all the other parties have been bound by the compromise. At the same time, I could not dismiss this bill without enabling the Plaintiff to try that question; but in truth, I am of opinion, that I can get at the same practical result without inflicting this expense and delay on the parties. I think that this bill may be properly characterised as an original bill in the nature of a supplemental bill, the object of which is to obtain the benefit of the decree of the 17th of *February*, 1835, and the proceedings in the suit as against the Defendants *Thomas Parker Bainbrigge* and *William Henry Bainbrigge*, and all persons claiming through them.

The observations I have made shew, that I consider that the time which has elapsed in this case can be no bar to the Plaintiff's demand. If the will of 1818 is the true will and the Plaintiff is entitled to revive, beyond all question, in that case, no time is necessarily a bar. It may be a bar because it is a question of discretion with the Court, which will refuse such permission when gross negligence or laches appear on the part of the applicant. Laches in this case there appears to me to have been none. The first infant tenant in tail died on the 14th of *July*, 1845; from that time down to *April*, 1851, the most active proceedings were taken to ascertain which of the two wills was the true one; the Plaintiff might well wait till this question was determined, without reviving the old suit and praying the same issue against the contesting parties. In *April*, 1851, a compromise was effected, by which, as I am told

told in the evidence of Mr. *Moss*, all charges for which the property was liable since the death of the testator, including what the Plaintiff was justly entitled to, were to be paid out of the 25,000*l.* charge. The Plaintiff might well wait some reasonable time to see if this were carried into effect. On the 9th of *May*, 1855, she filed this bill, nothing having been done. I cannot, as I have already said, infer, in the absence of proof, that the will of 1818 is not the real will, and that she is not entitled to revive that suit, and the delay, under the circumstances I have stated, appears to me to be excusable. I do not however ascertain how that fact stands for the reasons I have already stated, and because Mr. *Selwyn*, on behalf of the Plaintiff, in answer to a question from the Court, and in my opinion in the judicious exercise of his discretion, is willing that I should preface any decree that I might make with a preamble, in effect, admitting that the contention of the Defendants, viz. that the will of 1815 is, for all the purposes of this suit and so far as she is concerned, to be treated as the last and only binding will and testament of the testator *Thomas Bainbrigge*.

I shall, therefore, make a decree, declaring that the Plaintiff is entitled to have the benefit of the decree of *February*, 1835, against the Defendants, except so far as it establishes the will of 1818, and seeks to carry into execution the trusts of that will. I shall, then, repeat over again the accounts and inquiries directed in that suit, so far as they are necessary under the will of 1815, and I shall direct the accounts and inquiries taken and made under the former decree to be adopted under the decree I am now making, except that the Defendants are to be at liberty to contest the same. The effect of this will be, to throw the burthen of proof on the Defendants to shew that they are wrong, and so far as unimpeached they will be adopted.

1857.

ALSO  
v.  
BELL.

1857.

ALSO  
v.  
BELL.

adopted. I shall also so word the admissions made by the Plaintiff for this purpose, that it is not to be treated hereafter as an admission, on her part, that she is not entitled to have the suit of *Bainbrigg v. Blair*, instituted on the 29th *January*, 1831, revived as against the Defendants hereto, or, in fact, to be used for any purpose other than that of enabling the Court to make the decree pronounced by me, and for the purposes of this suit.

I admit that all this is extremely unusual in any decree, but I think it necessary, in order that the Plaintiff may not be entrapped, unintentionally on the part of the Court, into an admission, which, if the case were carried further, might enable the Court to hold, that such admission, on the Plaintiff's part, had precluded her from obtaining any relief whatever in this suit.

Having stated this to be the general character of the decree, I shall proceed to consider the extent of the relief to which the Plaintiff may be entitled, and what additional or other direction it will be proper to make in the decree I am about to pronounce, and for this purpose I will go briefly through the various points, or rather items, claimed by the Plaintiff and contested by the Defendants.

In the first place, I am of opinion that the Plaintiff is not entitled to any of the costs of the suit A. by the heir at law disputing both wills, or of the suit B. for the perpetuation of testimony, or of the suit C. which was not prosecuted.

But I am of opinion that the Plaintiff is entitled to have the costs of the suit D. charged on the estate, so far as any costs have been properly incurred in that suit, for the purpose of obtaining and properly directing inquiries which would have been necessary under the will



will of 1815, in order to administer the estate of the testator. I am of opinion that these are properly a part of the expenses of executing the trusts of the testator's will, and that they are properly payable out of the land devised by him for that purpose.

1857.

ALBON  
v.  
BELL.

With respect to the bond debt for 1,000*l.*, which has been paid out of the income of the estate, I am also of opinion that this must be treated as a charge on the *corpus* of the estate directed by the testator to be sold for the payment of debts. In fact, no question could arise on this part of the case, if the matter were recent, but as the payment was made under an order of 12th *June*, 1841, it is contended that the debt ceased at that time, for that it was paid off by the Court on behalf of an infant tenant in tail, and that, as you cannot now ascertain what the intention of the Court was, and as the debt was not kept on foot by any express assignment or declaration, it must be treated as merged in the inheritance, of which the infant was at that time tenant in tail; and, accordingly, it is contended, that if there was no actual merger, still that the debt must be considered now as nothing more than a simple contract debt of the person who paid it off, and that this person must be considered to be the tenant in tail, and that the Statute of Limitations has barred his claim, which, at all events, began to run on the 5th of *January*, 1849, when the Plaintiff took out administration to his estate, and which was above six years before this bill was filed.

But I do not concur in the view presented by either of these contentions. With respect to the former, when a payment is made by or under the sanction and authority of the Court, out of the estate of an infant, no intention can be imputed to the Court that can have the effect of prejudicing that infant's estate or possible interest

1857.

ALBOP  
v.  
BELL.

interest in any event. The act clearly cannot be treated as the act of the infant, and the presumption of merger, which would arise if the payment were made by a tenant in tail in possession *simpliciter*, does not occur. It is, in fact, nothing more than a payment made by the Court out of a fund that it has under its control, and which, on the facts stated to the Court, it deems to be advantageous to pay; but the Court does not thereby mean to alter or affect the rights of any parties, and no presumption of law, arising from the intention with which a sum of money is paid, can arise in such a case, in the absence of any declaration. It must, in my opinion, be treated exactly as it would have been, if the question had been brought before the attention of the Court in *August*, 1845, immediately after the death of the infant tenant in tail.

The pendency of the suit, in my opinion, prevents the Statute of Limitations from having any operation, and the legal personal representative of the infant tenant in tail is, in my opinion, entitled to stand in exactly the same situation, that the bond creditors would now be in if the bond had not been paid off, except so far as interest is concerned, for which she can make no claim for the period which elapsed during the life of the tenant in tail. The consequence is, that the real assets of the testator, which were liable at his decease, would be still liable to pay this debt; the personal estate and the lands devised for the payment of debts and funeral and testamentary expenses and the expenses of executing the trusts of the will are first liable for this purpose, but, if not sufficient, there may arise an equity to marshal the debt and throw it on the other real estate devised by the will, which would be real assets for this purpose, but I express no opinion on this question, for I do not know if it arises.

The

The next question, on which I have already touched, is the extent to which the costs of the suit D., or what parts thereof, are properly a charge on the land devised for the payment of debts, &c. The words of the will are, to apply the rents, moneys and proceeds arising from the lands so devised upon trust, in the "first place, to pay, satisfy and discharge all such just debts as I shall owe at the time of my decease, my funeral expenses, and the costs and charges of proving and attending the execution of this my will, and the several trusts herein contained." This, in my opinion, includes the costs of administration, and therefore, so much of the costs of the suit D. as have been properly incurred for the purpose of administering that estate are to be paid out of the real estate so devised. But no other costs of the various proceedings referred to are, in my opinion, properly payable out of this fund so created.

There will be some difficulty in working out my views on this subject, and I will allow counsel to speak to the minutes, after they are prepared, if they desire so to do, but, in order to afford some guide for this purpose, I have sketched out the following heads.

"The Defendants insisting that the will of 1815 is the only valid will of the testator *Thomas Bainbrigge*, and the Plaintiff admitting (for the purposes of this suit and so far as she is concerned) that the will of 1815 is to be treated as the last will and testament of the testator, provided always that such admission is not to be so taken as to prejudice any right, to which she may be entitled, to have the suit of *Bainbrigge v. Blair*, instituted on the 29th of *January*, 1831, revived as against all the Defendants, and the Defendants not asking for any issue to try which of the two instruments was the last will and testament of the testator *Thomas Bainbrigge*.

Declare

1857.

ALSO  
v.  
BELL.

1857.

ALSOPT  
v.  
BELL.

Declare the Plaintiff entitled to the benefit of the decree of the 17th of *February*, 1835, as against the Defendants hereto, in so far as the said decree provides for the administration of the estate of the testator, and in so far as the same would be necessary or proper under the will of the testator of 1815, but not so far as such decree establishes the will of 1818, and seeks to carry into execution the trusts of that will.

Repeat over again the accounts and inquiries directed by that decree, which are common to both wills.

Direct the accounts taken and inquiries made under the decree of the 17th of *February*, 1835, to be adopted under the decree now made; provided always, that any of the Defendants to this suit, who were not parties to that suit, shall be at liberty to surcharge and falsify any such accounts, and to adduce evidence for the purpose of disproving the correctness of any of the findings found by the Master in that suit.

Declare that the Plaintiff, as the legal personal representative of the tenant for life and the two infant tenants in tail, is entitled to be paid the sums which have accrued due and have been received in respect of the rents of the estates devised, subject to all just and proper deductions in respect of the matters herein contained.

Declare that the Plaintiff is entitled, as such personal representative of *Thomas Alsop Bainbrigg*, to the principal of the bond debt paid off under the order of the 12th of *June*, 1841.

Tax the costs which have been properly incurred in the suit of *Bainbrigg v. Blair*, filed on the 29th of *January*, 1831, in obtaining and prosecuting the directions and inquiries directed by the decree of the 17th of *February*, 1835,

1835, which would have been necessary under the will of 1815, for the purpose of administering the estate of the testator.

1857.

ALSO  
v.  
BELL.

Declare that such costs are to be paid out of the estate of the testator, in like manner as if such accounts and inquiries were taken again under this suit.

Declare that such costs, and also the said bond debt, are a charge on the property directed by the will of the testator to be sold for the purpose of paying debts, funeral and testamentary expenses, and the expenses of executing the trusts of his will."

These are the principal points which occur to me and which will probably require some expansion, and some additional directions, in order to enable them to be carried into effect. Although I have endeavoured to diminish the expense as much as possible by not requiring an issue to be tried to ascertain the validity of the will, and by adopting all the proceedings in suit D., I cannot but look with alarm at the probable expense of these proceedings, and I would suggest to the parties whether, by some arrangement, the money actually in Court and the money which has to be raised under the compromise of 1851, cannot be made available to satisfy the reasonable claim of the persons, who, under the compromise of 1851, have claims on the estate; and at the same time I may remark, that these persons themselves would do well to abate something from their demands, rather than embark in a litigation which must necessarily be prolonged and expensive, owing to the very nature of the original contention and subsequent proceedings, which have produced, unavoidably, a state of great complication, and which further litigation can only increase and multiply.

1858.



## THE UNIVERSITY OF LONDON v. YARROW.

Nov. 24.

Trustees had the option of establishing a charity in either of two ways, the one valid, and the other invalid. The fund was ordered to be paid to them without any undertaking as to the mode in which they would apply it, and without any declaration or direction of the Court on the subject.

THE testator gave 20,000*l.* Consols for founding, establishing and upholding an institution for investigating, &c. the maladies of quadrupeds or birds useful to man, within a mile of either *Westminster*, *Southwark* or *Dublin*.

At the hearing, it was declared, that the bequest "was a good and valid bequest and ought to be carried into effect" (a).

The decree was affirmed, on appeal, by the full Court (b).

A petition was now presented by the Plaintiffs for payment to them of the fund, which consisted of 22,600*l.* Consols and 2,364*l.* cash.

Mr. *R. Palmer* and Mr. *Amphlett* in support of the petition.

Mr. *Lloyd* for the executors.

Mr. *Wickens* for the *Attorney-General*. The charitable gift is perfectly valid if the institution be established in *Dublin*, but would be invalid if made in *England*, for it involves the bringing land into mortmain; *Re Clancy* (c). The option makes the gift valid, but the trustees

(a) 23 *Beav.* 159. (b) 1 *De Gex & J.* 72. (c) 16 *Beav.* 295.

trustees must exercise it in such a way as to secure the validity of the charity. I do not ask, on behalf of the *Attorney-General*, for a scheme, but for some undertaking on the part of the trustees, or some declaration or direction of the Court, which will secure the exercise of the discretion of the trustees, in such a way as to secure the object of the testator. If this Court were to direct a scheme, it would order the establishment to be fixed in *Dublin*.

1858.

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The  
UNIVERSITY  
of  
LONDON  
v.  
YARROW.

*The MASTER of the ROLLS.*

I do not mean to express any opinion as to whether the establishment of the charity in *England* would be good or bad, but I feel confident that the Court can give no directions on the subject. The legacy is given to the University of *London* as trustees to carry into effect the charitable intention of the testator. If they do not do so, the *Attorney-General* must file an information to compel them.

The money must be paid to the Plaintiffs and they must act at their own peril.

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Nov. 20, 21,  
23.

Dec. 2.

## WILLIAMS v. HUGHES.

A testatrix having a power of appointment over her late brother's property, subject to the life interest of A., by her will gave some legacies "out of her own personal estate," payable immediately after her decease, and other legacies "out of her brother's estate," payable on the death of A. She directed the duty on all the foregoing legacies to be paid, and charged them on the real estate. By a codicil she directed the second legacies to be paid immediately after her own death and gave other legacies.

Held, that on the will the second legacies were specific, but that on the codicil

they were demonstrative. Held, also, that all the legacies by the will and codicil were charged on the real estate and payable duty free.

THE testatrix *Elizabeth Williams* had, under the will of her brother, a power of appointing one moiety of his real and personal estate, subject to the life interests therein of his widow and of herself.

*Elizabeth Williams* made her will in 1850, whereby she appointed her brother's real estate to the Defendant *Hughes* in fee, in trust to raise 1,000*l.* for some legacies (which she revoked by a codicil), and subject thereto to stand possessed of such real estates in trust for *Ellis Price* and his heirs. She then gave to *Mary* and *Margaret Roberts* legacies of 100*l.* each and other legacies payable "out of her own personal estate immediately after her decease."

She "gave and bequeathed the following legacies out of the moiety remaining unappointed of her late brother's personal estate and to be paid after the death of his widow." She then specified a number of legacies, and amongst them legacies of 100*l.* each to *Mary* and *Margaret Roberts* and one of 200*l.* to *Charles James Watkin Williams*. And she bequeathed the residue of her brother's and of her own personal estate undisposed of by her will to *Jane Williams*. She thereby directed "that the duty upon all the foregoing legacies should be paid out of the residue of her personal estate, in order that the parties might receive their legacies in full ;



full; and if there should be a deficiency of her personal estate, either for payment of the legacies in full or for payment of the duty, then such deficiency must be made up out of the said real estate, on which she thereby charged the same."


1857.

WILLIAMS  
v.  
HUGHES.

In 1854 the testatrix made a codicil to her will, by which she altered and revoked some of the legacies and "in addition" to legacies given by her will to *Mary Roberts*, *Margaret Roberts* and *Charles James Watkin Williams*, she bequeathed to them "further the following legacies," (that is to say) to *Mary* and *Margaret Roberts* the sum of 200*l.* each, to *Charles James Watkin Williams* the sum of 800*l.*

"In regard to the legacies she had bequeathed in her said will out of the moiety remaining unappointed of her said late brother's personal estate, she thereby revoked the direction there given, that the same were to be paid after the death of her said sister-in-law, [her brother's widow,] and her will then was, that the same *should be paid immediately after her decease*, in common with the other legacies named in her said will and in that codicil."

In 1855, she made a second codicil, by which she devised a piece of land called *Ernback* to *Charles James Watkin Williams* in fee. She also revoked and altered some of the legacies, and altered the gift of her own residuary estate in these words, "and in case there is any surplus of money, after payment of my debts, funeral and testamentary expenses, and the several legacies directed by my said will and codicil to be paid out of my own estate immediately after my decease, I give and bequeath one-half of the said surplus, if any, to my said executrixes *Mrs. Francis Williams* and

1857.  
  
 WILLIAMS  
 v.  
 HUGHES.

and *Mary Elizabeth Goodman Roberts*, to be equally divided between them, and as to the other half thereof I bequeath the same" in trust for her poor relations and servants.

This codicil ended in these words:—"In all other respects I confirm my said will and codicil."

She died in 1855.

The cause now came on for further consideration, when several questions arose as to the legacies, there being a deficiency of personal estate.

It was argued, on the one hand, that all the legacies were charged on the real estate; *Jarman* on Wills (*a*), and on the other, that only those given by the will were so charged; *Bonner v. Bonner* (*b*); *Radburn v. Jervis* (*c*); the charge being limited to the "foregoing legacies;" *Hall v. Severne* (*d*), where a similar limited construction had been given to the words "before-mentioned legacies."

Secondly, it was argued, on one side, that the legacy duty was payable on all the legacies; *Byne v. Currey* (*e*); on the other side, it was said that this direction was limited to the "foregoing legacies;" *Early v. Benbow* (*f*).

Mr. *R. Palmer* and Mr. *W. W. Cooper* for the Plaintiff, one of the residuary legatees.

Mr. *Selwyn* and Mr. *Fischer* for legatees.

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(a) Vol. 1, p. 154 (2nd edit.)  
 12 *Ves.* 379.

(d) 9 *Sim.* 515.  
 (e) 2 *Cr. & Mee.* 603.  
 (f) 2 *Coll.* 354.

Mr. *Follett* and Mr. *Amphlett* for parties entitled to the real estate.

1857.

WILLIAMS  
v.  
HUGHES.

Mr. *Lloyd* and Mr. *Shapter* for other legatees.

*The MASTER of the ROLLS* was of opinion that all the legacies, given either by will or codicils, were charged on the real estate and were given free of legacy duty ; but he said that his impression was, that the legacies payable out of the appointed estate were not, and that he would consider the case.

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On a subsequent day, it was argued, that the legacies bequeathed out of the brother's personal estate were payable out of that estate alone, and were neither charged on the real estate nor payable free of legacy duty, and that the additional legacies, given to *C. J. Watkin Williams* and other legatees by the codicil, were payable out of the same fund only, namely, out of the brother's estate exclusively.

Mr. *Cary* and Mr. *W. D. Griffith* for *Charles James Watkin Williams*, argued, that the Court leant against holding legacies to be specific, and that in this case the legacies out of the brother's estate were demonstrative and not specific, and were, therefore, payable out of the general personal estate, if necessary ; *Ashburner v. Macquire* (a) ; *Colrile v. Middleton* (b) ; *Chaworth v. Beech* (c) ; *Kirby v. Potten* (d) ; *The Attorney-General v. Parkin* (e).

Secondly,

(a) 2 B. C. C. 108.  
(b) 3 Beav. 570.  
(c) 4 Ves. 335.

(d) 4 Ves. 748.  
(e) Amb. 566.

1857.  
  
 WILLIAMS  
 v.  
 HUGHES.

Secondly, that these legacies were charged on the real estate, and payable free of legacy duty, for the rule was, that additional legacies were payable out of the same fund and subject to the same modifications; *Cooper v. Day* (a); and see *Day v. Croft* (b) and the cases there cited.

Mr. *Follett* argued, that these legacies were specific, the distinction being, that here the legatees took merely out of the brother's estate, under the execution of a power of appointment, and that their rights were limited by the extent of that appointment.

*The MASTER of the ROLLS*:—I will read the will and reconsider all the points.

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*The MASTER of the ROLLS.*

Dec. 2. The question on which I reserved my judgment was whether the legacies given by *Elizabeth Williams* out — of the moiety of her brother's estate, and which she had a power to appoint after the death of his widow, were demonstrative legacies payable generally out of her personal estate, or whether, if that moiety of her brother's estate failed to be sufficient for that purpose, they must abate.

The cases on this subject are very numerous, but I think the rule is well expressed by Sir *James Wigram* in *Dickin v. Edwards* (c). He there observed, "There is no doubt, that where a testator bequeaths a sum of money

(a) 3 *Mer.* 154.  
 (b) 4 *Beav.* 561.

(c) 4 *Hare*, 273, 276.

money in such a manner as to shew a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled, merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund. It may be difficult, in some of the reported cases, to discover the evidence of that separate and independent intention, which the Court has ascribed to a testator rather than allow the objects of their bounty to be disappointed, but I understand the principle of all the decisions to be that which is relied upon by Sir *T. Plumer* in *Mann v. Copland* (a), and is expressed, I think, with sufficient distinctness by Lord *Macclesfield* in *Savile v. Blacket*" (b).

1857.

WILLIAMS  
v.  
HUGHES.

I concur in this, and I think that the principle of these cases is, that it must appear distinctly by the will, that the testator intended the legatee at all events to have the legacy. What constitutes the evidence of that intention on the part of the testator seems, as Sir *James Wigram* observes, to vary considerably in different cases, and to be a matter of very great nicety in many of them. I shall not go through the cases on this subject, which are very numerous, but merely refer to a few which seem to bear on it, as *Savile v. Blacket* (b); *Masters v. Masters* (c); *Attorney-General v. Parkin* (d); *Cartwright v. Cartwright* (e); *Mann v. Copland* (f); *Fowler v. Willoughby* (g); *Wilcox v. Rhodes* (h); *Colville v. Middleton* (i). These all establish the general proposition, and were cases where the legacy was deemed demonstrative, although it was directed to be paid out of

(a) 2 *Madd.* 223.(b) 1 *P. Wms.* 777.(c) 1 *P. Wms.* 421.(d) *Amb.* 566.(e) 2 *Bro. C. C.* 114.(f) 2 *Madd.* 223.(g) 2 *Sim. & St.* 354.(h) 2 *Russ.* 452.(i) 3 *Beav.* 570.

1857.  
WILLIAMS  
v.  
HUGHES.

of a particular fund. There are many other cases to the like effect, which I have looked at, but which do not vary materially from those I have stated; but these cases must be distinguished from those where the only gift is in the direction to pay the legacy out of a particular fund. In the case of land, the land alone is liable in such a case, and if it fail the legacy also fails. This was the case in *Spurway v. Glynn* (a), where the legacy was payable out of the real estate, and not out of the general personal estate, though the circumstances of the case shewed a considerable desire on the part of the testator that the legatee should have the legacy.

There is another case, of *Dickin v. Edwards* (b), where the trust was to raise a sum of 1,000*l.* by the sale of timber for the Plaintiff, and the testator gave pecuniary legacies, and then bequeathed the residue of his personal estate, "subject to the payment of his legacies," &c. It was held that the 1,000*l.* was not charged on the personal estate.

Another case on the subject is *Welby v. Rockcliffe* (c), which is to the same effect.

It would be difficult to find any just reason for holding that this rule applied exclusively to cases of legacies given out of real estate, or the produce of real estate. In *Walker v. Laxton* (d), which is the strongest case on the subject, a testatrix had a power to appoint a sum of 2,200*l.*, and she proceeded to appoint the whole of the precise sum in several legacies to different persons. The

(a) 9 *Ves.* 483.  
(b) 4 *Hare*, 273.

(c) 1 *Russ. & M.* 571.  
(d) 1 *Y. & J.* 557.

The Lord Chief Baron, who was very conversant with the principles and doctrines of equity, was of opinion, that as the amount of these particular gifts and of the fund subject to the power exactly tallied, the legacies were a charge on the fund only, and that the general personal estate was not liable.

1857.

WILLIAMS  
v.  
HUGHES.

It seems to me difficult to reconcile all the cases on this subject, otherwise than by saying, that it is always a question of intention, to be discovered from the will itself, and that which is evidence of such intention in one will is not so in another, unless the circumstances are identically the same.

This case however differs from those which I have referred to in this respect:—There is a will and codicil; by the will there is no gift, except out of the fund appointed, and they are not to be paid until after the death of her sister in law. If the case stood on the will alone, I should be of opinion that no intention could be discovered that the legacies in question should be paid at all events, even out of the personal estate, if the original fund failed, and consequently that the appointed fund alone would be charged with them.

But the codicil completely alters the case, and varies the intention of the testatrix as stated in the will.

By the codicil, in addition to the legacies given out of the appointed fund, she gives certain additional legacies, and goes on to say, “in regard to the legacies I have bequeathed out of my moiety remaining unappointed of my brother’s personal estate, I hereby revoke the directions there given that the same are to be paid after the death of my sister in law, and my will now is, that the same shall be paid immediately after  
my

1857.

WILLIAMS

v.

HUGHES.

my decease, in common with the other legacies named in my will and in this codicil."

If this direction is to be carried into effect, it is difficult to distinguish one legacy from another; she puts all the legacies in the same situation. It is a circumstance of the greatest importance, that having by the will directed that the legacies out of the appointed fund should not be paid until after the death of tenant for life; that is, the payment was to be postponed until the fund fell in and became available. By the codicil she directs all the legacies, including these, to be paid together immediately after her decease.

I think, therefore, that I discover an intention that these legacies should be paid at all events; that they must be treated as demonstrative legacies, and payable like the others out of the personal estate.

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*The MASTER of the ROLLS* also held, that all the pecuniary legacies were charged on the real estate, and were payable free of legacy duty.

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1857.

## WHEATON v. GRAHAM.

**B**Y this bill the Plaintiff, a second mortgagee, sought to redeem the Defendants, the first mortgagees.

The Defendants unsuccessfully resisted the Plaintiff's right to redeem, first, on the ground of an alleged sale under a power contained in the mortgage deed, and, secondly, on the ground that by letter the right to redeem had been relinquished.

*Mr. Selwyn* and *Mr. Cotton* for the Plaintiff.

*Mr. Lloyd*, *Mr. Money*, *Mr. R. Palmer*, *Mr. Hobhouse*, *Mr. Bagshawe*, *Mr. Rogers* and *Mr. Rasch* for the Defendants.

The Court having held that the Defendants had failed on both points, and that the Plaintiff was entitled to redeem, made the following observations as to the costs :—

*The MASTER of the ROLLS.*

The only remaining question is as to the costs, and upon that I am bound to say, that, so far as the costs of this suit have been occasioned by the Defendants' resisting the Plaintiff's right to redemption, they are due to the Plaintiff. But as the Court is not always sure that the Plaintiff will redeem, it does not order the costs to be paid to the Plaintiff, but directs them to be taken in part discharge of what may be found due to the Defendants upon their mortgage debt. Considering the circumstances

*Nov. 12.*  
The Plaintiff, a second mortgagee, obtained the costs of so much of a suit for redemption as had been incurred by the Defendants, the first mortgagees unsuccessfully disputing his rights to redeem. But the Court, instead of ordering those costs to be paid to the Plaintiff personally, directed them to be set off in case of the Plaintiff's redeeming.

1857.  
WHEATON  
v.  
GRAHAM.

circumstances of this case, I apprehend that this will be the proper form, subject to what Mr. *Selwyn* may urge in reply. I remember, when at the bar, decrees being made in that form, when there was a doubt whether, when the accounts were taken, it would be for the interest of the Plaintiff to redeem the prior mortgagees. This seems to me the fair and reasonable mode of dealing with the costs.

Mr. *Selwyn*, in reply, asked for all the costs of the suit. He cited *Baker v. Wind* (a).

*The MASTER of the ROLLS.*

I give the Plaintiff the costs of the suit, so far as they have been occasioned by the Defendants' resistance of his right to redeem, but I shall direct, that, upon redemption by the Plaintiff, they shall be taken in discharge *pro tanto* of what may be found due to the first mortgagees on taking the account.

(a) 1 *Ves. Sen.* 160.

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1857.

## FEAKES v. STANDLEY.

THE testator, *Charles Lacey*, devised his lands, &c., to his wife for life, and then proceeded in the following terms:—"And immediately after the decease of the said *Rebecca* my wife, I give and devise all my said messuages unto *Charles Feakes* my nephew, to hold the same unto the said *Charles Feakes* my nephew, his heirs and assigns for ever."

But in case the said *Charles Feakes* my nephew should depart this life before the said *Rebecca* my wife, without leaving lawful issue, then it is my will, that immediately after the decease of the said *Rebecca*, my wife, the said lands, &c., shall be sold, and the money arising from such sale shall be divided equally, share and share alike, between the family nearest of kin to me *Charles Lacey* and the family nearest of kin to the said *Rebecca* my wife jointly.

"Also in case the said *Charles Feakes* shall outlive the said *Rebecca* my wife and depart this life without leaving any lawful issue, then it is my will, that the said lands, tenements and hereditaments shall be sold by his executors, and the money arising from such sale shall be divided, share and share alike, between the said families nearest of kin of me *Charles Lacey* and of the said *Rebecca* my wife jointly."

The testator died in 1837, and his widow in 1857. The Plaintiff *Charles Feakes*, who was a bachelor, had agreed to sell part of the property to the Defendant *Standley*,

Nov. 23.  
Devise to *A.* for life, with remainder to *B.* and his heirs, but if *B.* died in the life of *A.* "without leaving lawful issue," then immediately after the death of *A.* the lands were to be sold and the produce divided. And in case *B.* should outlive *A.*, and die "without leaving any lawful issue," then the lands were to be sold by *B.*'s "executors" and the proceeds divided. *B.* survived *A.* Held, that he took an estate tail, and not an estate in fee with an executory devise over, and therefore that he could make a good title to a purchaser.

1857.

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FEAKES

v.

STANDLEY.

*Standley*, and questions had arisen between them as to the title.

The Plaintiff contended, that according to the true construction of the will, he was now tenant in tail in possession of the property sold, and was able, by means of a deed enrolled under the "Fines and Recoveries Abolition Act," to convey the same to the Defendant in fee simple.

The Defendant, on the other hand, contended, that according to the true construction of the will, the Plaintiff was now tenant in fee simple of the property, but that his estate therein was subject to be defeated by a sale of the property by his executor, in the event of his dying without leaving any issue living at his decease, or that the true construction of the will was open to such serious doubt, that the title was not such as an unwilling purchaser would be compelled by a Court of Equity to accept.

The parties agreed to submit the following questions to the decision of the Court, upon a special case:—

Firstly. What estate the Plaintiff was now entitled to in the lands devised by the will.

Secondly. Whether the Defendant, under a proper assurance from the Plaintiff enrolled under the "Fines and Recoveries Abolition Act," would acquire such a title to the hereditaments agreed to be sold as he could, in a suit for specific performance, compel an unwilling purchaser to accept.

Mr. *Bevir* for the Plaintiff. This property is, in the first instance, devised to the Plaintiff and his heirs, and  
in

in case he should die without leaving any lawful issue, then over. This gift over is upon an indefinite failure of issue, and the fee previously given is cut down to an estate tail; *Machell v. Weeding* (a). The Plaintiff, therefore, upon barring the entail, can give a good title to a purchaser.

1857.  
  
 FEAKES  
 v.  
 STANDLEY.

Mr. Dart, *contra*, for the Defendant. The Plaintiff took an estate in fee, subject to gifts over in two alternative events. The estate is here, in the first instance, limited to the Plaintiff in fee, and there is a distinction between such a case and one in which the prior gift is for life only. In the latter case, the parent of necessity takes an estate tail, in order to prevent his issue being altogether excluded; but in the former case, the Courts "have generally lent a willing ear to the arguments in favour of the restricted interpretation" of the words dying without leaving any lawful issue; *Jarman on Wills* (b). It is contrary to the common understanding of mankind to hold, that dying without leaving issue means dying without issue at any future time, however remote, and the legislature, in the 1 Vict. c. 26, has stamped such a construction with its disapprobation in regard to all future wills.

But, on the face of this will, it is manifest that the failure of issue contemplated was a failure at the death of *Charles Feakes*, for at that time "his executor" is directed to sell. [*The MASTER of the ROLLS*.—If *Charles Feakes* died intestate, could no sale have taken place?] However that may be, the words shew that the

(a) 8 Sim. 4, and see *Doe d. Lord*, 14 C. B. 702; and 2 *Cadogan v. Exart*, 7 Ad. & E. *Jarman on Wills*, 423, 446.  
 636; *Doe d. Todd v. Duesbury*, (b) Vol. 2, page 442.  
 8 Mee. & W. 514; *Bamford v.*

1857.  
  
**FEAKES**  
 v.  
**STANDLEY.**

the testator intended that a sale was to take place immediately on the Plaintiff's death, if he left no issue.

The words "without leaving lawful issue" are used twice, and they must be construed in the same way in the first and second clauses. It is clear that in the first the sale was not to take place on an indefinite failure of issue and at a remote period, but "immediately after the decease" of the testator's wife. If *Charles Feakes* had died without issue in the life of the widow, it would have been held, that he took the fee. The same construction must therefore prevail in the events which have happened.

He cited *Greenwood v. Verdon* (a); *Roe v. Jeffery* (b); *Doe v. Webber* (c); *Porter v. Bradley* (d); *Jarman on Wills* (e).

*The MASTER of the ROLLS.*

I should take time to consider this case if I felt any hesitation on it, but I do not. I think *Charles Feakes* took an estate tail, and I should have no difficulty in compelling a purchaser to take the title, on his executing a disentailing deed.

It has been argued, that as the testator has said that the sale should be made by the executor of *Charles Feakes*, this points to something to be done immediately on his death. But can it be said, that because the word "executor" is used, which is the common designation in wills of personal representatives, that it would limit the power to the executor, and that if the executory devise took effect fifty years hence, this Court would find a difficulty

(a) 1 *Kay & J.* 74.

(b) 7 *T. R.* 589.

(c) 1 *Burn. & Ald.* 713.

(d) 3 *T. R.* 143.

(e) Vol. 2, page 433.

difficulty in executing it? I think not, and I cannot doubt that "executor" means legal personal representative, and that there is nothing to restrict the sale to the period of the death of *Charles Feakes*, but that it may be executed on his death and failure of his issue.

1857.

FEAKES  
v.  
STANDLEY.

Another argument is raised upon the effect of previous limitation, but this does not embarrass me. The testator has given the estate to his wife for her life, with remainder in fee to *Charles Feakes*, and he then says, that in case of his death in the life of my wife without leaving lawful issue, I desire it shall be sold and the produce divided; but in case he survives my wife and dies without leaving lawful issue, I desire it to be sold and the produce divided. It is said, that, during the life of the wife, *Charles Feakes* took the fee, with an executory devise to arise on his death in the lifetime of the wife.

But why is this inconsistent with an intention that if *Charles Feakes* should survive instead of predeceasing the widow, he should have an estate tail, and on his death and failure of his issue the estate should be sold and divided? I think the testator leaves the second limitation in the same situation as if the first had been omitted.

I do not think this construction militates with *Doe v. Webber*, but I think that a contrary construction would be opposed to many other cases. The case before the Vice-Chancellor I consider distinguishable, and the cases of *Roe v. Jeffery (a)* and *Porter v. Bradley (b)* have been repeatedly doubted and at last overruled.

Declare the Plaintiff took an estate tail, and that on executing a disentailing deed he can make a good title.

(a) 7 T. R. 589.

(b) 3 T. R. 143.

1857.

June 6.

The Plaintiff set down the cause, but neglected to serve a *subpœna* to hear judgment within time. The cause became afterwards abated by the death of a Defendant. Held, under these circumstances, that an order to dismiss was regular.

## WILLIAMS v. PAGE.

THE bill was filed in 1853, and after great delay the cause was ultimately set down in *August*, 1855, but no *subpœna* to hear judgment had been served. The cause became subsequently abated by the death of a Defendant. On the application of *Dabbs*, one of the Defendants, an order had been recently made to dismiss the bill for want of prosecution, and the question now raised was, whether that order was regular.

Mr. *R. Palmer*, for the Plaintiffs. The order to dismiss is irregular; the case does not come within the 114th Order of *May*, 1845, s. 4 (*a*), for the suit is abated. The proper order would have been, that the Plaintiffs should revive within a limited time, or otherwise that the bill might be dismissed. Secondly, the Defendant has the remedy in his own hands, for under the 116th Order of *May*, 1845 (*b*), he might himself set down the cause and serve a *subpœna* to hear judgment. Lastly, the Court may, at all events, relieve the Plaintiffs from the effect of their inadvertence; *Douglas v. Archbutt* (*c*).

Mr. *Lloyd* and Mr. *Hardy*, *contra*, were not heard.

The MASTER of the ROLLS considered the order to dismiss regular, and refused the application with costs.

(*a*) *Ord. Can.* 330.

(*b*) *Ibid.* 331.

(*c*) 23 *Beav.* 293.



1857.

*In re* PEARCE.

Dec. 21.

**T**HE testator, *George Pearce*, bequeathed to his executors 2,000*l.* £3 per Cent. Consols, upon trust to pay the income to his niece for life, and after her decease, he bequeathed the said sum "unto the vicar and churchwardens for the time being of the parish of *Staines, Middlesex*, to the intent that the interest and dividends thereof should be distributed, every year, equally amongst six poor men and six poor women, being parishioners of the said parish, and being members of the Established Church, of pious, sober and industrious habits, and who should not have received parish relief for at least twelve months previous to such distribution, and who should respectively be upwards of fifty years of age, to be ballotted for by the inhabitant householders of the parish of *Staines*, who should attend and be present at a meeting to be convened for that purpose on the first *Monday* in *February* in every year, each householder being entitled to one vote only, and the same to be distributed as aforesaid on the *Monday* following such meeting. And his will was, that no such persons as aforesaid should be eligible for two years in succession, nor should any person who had obtained the gift under the will of *George Fourmer*, late of *Staines* aforesaid, deceased, be eligible for his until fifteen months afterwards."

Bequest to trustees of 2,000*l.* Consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession. Held, liable to legacy duty. Accountant-General ordered to pay the income of a fund in Court to the vicar of *S.* for the time being.

The testator died in 1849, and his niece in 1856.

This was a petition by the vicar and churchwardens for payment of the income of the fund. The question which

1857.  
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*In re*  
PEARCE.

which arose upon it was, whether the Stock was liable to the payment of legacy duty, it being impossible to say, that the amount or value which each poor person would take would exceed 20*l*.

Mr. *R. Palmer*, in support of the petition, referred to *Ex parte Wilkinson* (a); In the matter of *Francklin's Charity* (b); The *Attorney-General v. Fitzgerald* (c).

Mr. *W. H. Clark*, for the executors.

Mr. *Simpson*, for other parties.

*The MASTER of the ROLLS.*

I am of opinion that legacy duty is payable, and I have no doubt that the case in the Exchequer would not now be followed.

Let the income be paid to the vicar for the time being; there are many cases in which the Accountant-General acts on such an order.

(a) 1 *Crompton, M. & R.* 142,  
and 1 *Mee. & W.* 237.

(b) 3 *Simons*, 147.  
(c) 13 *Simons*, 83.

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1858.

## DAVEY v. DURRANT.

THIS was a suit for redemption, and by the decree certain accounts were directed to be taken in Chambers (a).

March 17, 23.

A party to a cause, upon being cross-examined on his affidavit, is entitled to be paid his reasonable expenses by the party cross-examining him, in the same way as a witness under the 15 & 16 Vict. c. 86, s. 38.

The Defendant *Durrant* brought in the accounts, which he verified by affidavit. The Plaintiff thereupon required him to attend to be cross-examined on his affidavit. The Defendant, who was a solicitor, resident at *Norwich*, attended accordingly, but he refused to be sworn or cross-examined until the Plaintiff had paid his expenses of attending, in the same way as he would be bound to pay an ordinary witness under the 15 & 16 Vict. c. 86, s. 38.

Mr. *W. W. Cooper* now moved that the Defendant might submit to be cross-examined, or in default be committed. He argued that there was a clear distinction between a witness and a party, and that a party to a cause was bound to give all necessary discovery without any previous tender of his expenses being made, and that his costs must await the ultimate decision of the cause. He pointed out that the 38th section, giving the "reasonable expenses," applied only to "any witness who had made an affidavit," and that the 40th section, which alone applied to "any party in any cause," made it obligatory on a party to attend to be cross-examined, and did not require his expenses to be paid, as the 38th section expressly did. He also argued, that under the 61st Order of the 3rd of *April*, 1828 (b), an accounting party

(a) See 1 *De Gex & Jones*, 535, and *ante*, p. 411. (b) *Ord. Can.* 25.

1858.  
  
 DAVEY  
 v.  
 DURRANT.

party might be examined upon interrogatories at his own expense, and that the proceeding by cross-examination was an analogous but a more convenient mode of proceeding, and was governed by similar rules.

Mr. *Baggallay*, *contra*, argued, that the Plaintiff having required the Defendant to come from a distance to be cross-examined, instead of proceeding by filing interrogatories, which might have been answered in the country, had placed him in the situation of a witness, and entitled him to require payment of his reasonable expenses. That if it were otherwise, a party to a cause might be compelled repeatedly to come to *London* from any distance at his own expense, in order to give evidence or be cross-examined in a cause.

Mr. *W. W. Cooper* in reply.

The following cases were referred to: *Hayward* v. *Hayward* (a); *Besemeres* v. *Besemeres* (b); *Clark* v. *Gill* (c); *Nokes* v. *Gibbon* (d); and see *Brocas* v. *Lloyd* (e).

*The MASTER of the ROLLS.* I will consult the Judges of the other branches of the Court, in order that the practice may be uniform.

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*The MASTER of the ROLLS.*

*March 23.* I have communicated with the Vice-Chancellors, and they all concur, that the clause in the Act of Parliament refers

(a) *Kay*, App. xxxi.  
 (b) *Kay*, App. xvii.  
 (c) 1 *Kay & J.* 19.

(d) 3 *Jur. (N.S.)* 282.  
 (e) 23 *Beav.* 129.

refers as much to the examination of a party as of a witness, and accordingly, in every case in which a party to a cause, whether an accounting party or not, is called on to give evidence, or is cross-examined, his reasonable expenses must be paid by the person cross-examining him, in the same way as a witness under the 48th section of the 15 & 16 *Vict.* c. 86.

1858.  
  
 DAVEY  
 v.  
 DURRANT.

I have ascertained that in my own Chambers and in those of the Vice-Chancellors the operation of this rule is very beneficial, and prevents much vexation.

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MAXWELL *v.* The PORT TENNANT PATENT  
 STEAM FUEL AND COAL COMPANY.

1857.  
 Nov. 5.

**T**HE Plaintiff *Maxwell* was the owner of the lease of a colliery and of a licence to use a patent for making the small coal into blocks.

The Plaintiff agreed to sell a colliery to a joint-stock company for 8,000*l.* in paid-up shares; but there was a private arrangement, not communicated to the shareholders, that 2,500*l.* of these should be given as a bonus to the directors. Held, that the Plaintiff could not sustain a bill for specific performance.

In 1853, a company was projected for working the colliery and patent, and for that purpose to purchase the Plaintiff's interest therein. Accordingly, at a meeting of the projectors held in *March*, 1853, a provisional agreement was entered into for the purchase of the Plaintiff's interest for 8,000*l.* in paid-up shares.

There existed, however, a private arrangement between the parties, that the Plaintiff should gratuitously make over 2,500*l.* of these paid-up shares to *Yates*, the chairman of the company, to be divided between the directors and trustees of the company. He was also to make over 750*l.* of paid-up shares to the soli-

1857.

  
 MAXWELL

v.

 THE PORT  
 TENNANT  
 PATENT  
 STEAM FUEL  
 AND COAL  
 COMPANY.

citor of the company, and 500*l.* in like shares to the secretary.

After the complete registration of the company in *December*, 1853, the directors, in *January*, 1854, issued a prospectus explanatory of the objects and prospects of the company, which contained the following passage as to the proposed purchase :—" An arrangement has been entered into with the lessee of the coal property for the purchase of the lease of the colliery, together with the plant and machinery, *at the price of 8,000*l.** in paid-up shares. He also assigns to the company his entire interest in the patent."

The abstract of the Plaintiff's title to the lease was delivered, and the title was accepted. The assignment was prepared but not executed.

The deed of settlement was executed by the Plaintiff for the 8,000 *l.* shares.

A considerable number of shares were taken, but the object of the company failed, and it never commenced its operations.

In 1856, the Plaintiff *Maxwell* instituted the present suit against the company and *Yates*, praying that the company might specifically perform the contract and accept an assignment of the lease, and take upon themselves the payment of the rent and the performance of the covenants, and enter into all proper covenants for indemnifying the Plaintiff.

Mr. *R. Palmer*, Mr. *Jessel* and Mr. *Freeman*, for the Plaintiff.

Mr.

Mr. *Selwyn* and Mr. *Deane*, for the Defendants, the company, argued, that there was no valid contract binding on the company ; and secondly, that the nature of the concealed arrangement between the vendor and the directors prevented the Plaintiff obtaining relief.

1857.  
MAXWELL  
v.  
The PORT  
TENNANT  
PATENT  
STEAM FUEL  
AND COAL  
COMPANY.

*The MASTER of the ROLLS* in substance said :—

I have no hesitation in holding that this bill must be dismissed.

The ground on which my decision proceeds is this :—There was a private arrangement between them, that the directors should obtain a personal benefit by the transaction, and as this was not communicated to the shareholders they cannot be bound by the contract. The directors are persons who are entrusted to manage the affairs and carry into effect the contracts of a company for the shareholders, who place implicit reliance on them. If, therefore, in their dealings on behalf of the company, anything occurs by which the directors gain a private advantage for themselves, it ought to be communicated to the body of shareholders ; and all persons must be held to be cognizant of this principle.

Here this is undisputed, that the Plaintiff considered 4,500*l.* in paid-up shares a sufficient price for his interest ; and, on the evidence, no one could doubt, that there was an arrangement, or understanding at least, that 2,500*l.* in shares should be paid to *Yates*, in trust to be distributed by him amongst the directors and trustees of the company, and if so, it was the duty of the directors to state that fact distinctly to the shareholders before they gave 8,000*l.* for the Plaintiff's interest. The Plaintiff, who was a party to this arrangement, must be treated as being also aware that no contract, of which  
such

1857.  
  
 MAXWELL  
 v.  
 The PORT  
 TENNANT  
 PATENT  
 STEAM FUEL  
 AND COAL  
 COMPANY.

such an arrangement formed a part, could bind the shareholders until communicated to them.

This is also confirmatory of the fact, that the individual interests of the directors was a leading motive for entering into the contract: they seem to have taken no pains to examine into the value of the mine before they agreed to pay this sum for its purchase. It was their duty to do so, and to ascertain whether the sum proposed to be given was a fair price to be paid by the company for the mine, but in truth the worth of the mine was to be paid to the Plaintiff and the residue of the 8,000*l.* was to be divided between the directors.

It is plain, on ordinary principles, that such a transaction cannot bind the parties, and I am therefore of opinion in this case, that the Plaintiff cannot have any specific performance, and his bill must be dismissed.

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JOHNSON *v.* HAMMERSLEY.

Dec. 10.

After decree in a creditors' suit the Plaintiff died, leaving no personal representative. The Court refused to allow the suit to proceed upon the motion of the accounting parties, but offered to do so if a creditor applied.

**A**FTER decree in a creditors' suit, the sole Plaintiff died, and there being no legal personal representative, the Defendants, the accounting parties, applied, by motion, that the proceedings might be continued, notwithstanding the Plaintiff's death.

Mr. *Hoare*, in support of the application, cited *Brown v. Lake (a)*, in which case the Plaintiff, in a creditors' suit, died after decree, and the Court, upon petition of a creditor, ordered the decree to be prosecuted. He argued that this was, under the circumstances, an analogous proceeding, and that it was unnecessary to revive the suit.

*The*

(a) 2 *Collyer*, 620.



*The MASTER of the ROLLS.*

1857.

How can this be done; who is to prosecute the suit? There is no representative of the Plaintiff, and the application is made by the Defendants. If a creditor applied I could allow him to carry on the suit instituted for his benefit, because, after decree, all creditors are as Plaintiffs. I am prepared to do that, but that is all I can do. If any creditor will now undertake to carry on the suit, I will consider this as an application made by him, and will give him the conduct and carriage of the suit.

JOHNSON  
v.  
HAMMERSLEY.

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NOTE.—See *Cook v. Bolton*, 5 *Russ.* 282; *Dixon v. Wyatt*, 4 *Madd.* 392; *Williams v. Chard*, 5 *De Ges & Sm.* 9; *Lys v. Lee*, 10 *Hure, App.* lxxii, and 4 *De Ges, M. & G.* 219; *Lord Cloncurry v. Piers*, 3 *Jones & L.* 573.

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NOBLE v. SARAH BRETT.

Dec. 22.

NOBLE v. SAMUEL BRETT and Others.

1858.

Jan. 13.

THE testator, *Samuel Hodges*, died in 1846. By his will, he bequeathed to each of his two sons, *Samuel* and *William Hodges*, 2,000*l.*, and he directed, that immediately after his decease, 4,000*l.* should be invested in the public funds for the purpose of securing the said legacies in the joint names of his executors and legatees in the joint names of his executors and legatees, and the residuary legatee received the clear residue. Ten years afterwards, a debt, of which the executors had been previously ignorant, was established against the estate. The residuary legatee being insolvent, and the legacies being still in the joint names and under the control of the executors: Held, that such legacies were liable to the payment of the debt, both as against the legatees and a purchaser to whom one had assigned his legacy, whatever might be the rights of the legatees, or of the persons claiming under them, if any, as against the executors.

A purchaser of a legacy, which has been paid or delivered, cannot be called on to refund or pay any portion of a debt subsequently established against the testator's estate. *Scmble.*

Executors,  
under direc-  
tions contained  
in the will,  
transferred  
legacies into  
the joint names  
of themselves  
and the infant  
legatees, and  
the residuary



1857.

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NOBLE

v.

BRETT.

*Samuel and William Hodges.* And he further directed, that the said sum of 4,000*l.* should remain so invested until his said two sons should severally attain the age of twenty-five years, at which times he desired that the said sum of 2,000*l.* might be respectively paid to each of them by his executors.

Until they attained twenty-five, he directed the interest to be paid to their mother, *Sarah Brett*, for their maintenance.

The testator bequeathed the residue of his estate to *Sarah Brett*, and he appointed, as trustees and executors of his will, the Plaintiff *William Noble*, the Defendant *Sarah Brett*, and Defendant *Joseph Davies*.

The executors and executrix proved the testator's will immediately on the testator's death, and they paid all the debts of which they had any knowledge, and invested the legacy of 4,000*l.* as follows, viz.: — One moiety thereof (after payment of the legacy duty thereon) was invested in the joint names of the executors, the executrix, and *Samuel Hodges* the legatee, in the purchase of 1,872*l.* 11*s.* 3*d.* £3 per Cent. Consolidated Bank Annuities, and the other moiety thereof was, in like manner, invested in the names of the executors, the executrix and *William Hodges*. Such investment was made in the full belief that all the debts of the testator had been fully paid and satisfied.

The clear residue, consisting apparently of a sum of 308*l.* 8*s.* 11*d.*, was received by the residuary legatee, *Sarah Brett*, in the year 1846. She also, under the trusts of the will, received the income of the two legacies for the maintenance of the testator's two sons.

In

In *October*, 1855, *Samuel Hodges*, who had previously incumbered his legacy, sold and assigned it, out and out, to Mr. *Hayley* for 1,500*l.*

1857.

NOBLE  
v.  
BRETT.

A claim afterwards arose against the testator's estate for breaches of the covenants contained in a lease granted to the testator, and which expired at *Michaelmas*, 1855; and in *May*, 1859, Mr. *Dyson* brought an action-at-law against *Noble* and *Sarah Brett* (as executor and executrix of the testator) for those breaches of covenants.

In *July*, 1856, *Noble*, finding himself in a position of difficulty, filed a claim against *Sarah Brett* for the administration of the estate, and by the decree, made in *November*, 1856, it was ordered, that the following inquiries should be made:—what debts, if any, of the testator *Samuel Hodges* remained unpaid, and whether there was any and what personal estate of the testator, and in whose hands, applicable for the payment of such debts of the testator, if any, as so remained unpaid. And the further consideration of the cause was adjourned.

In *December*, 1856, and before these inquiries had been prosecuted, *Noble* filed his bill in the second above-mentioned cause against the testator's two sons, the executrix and *Hayley*, which, after stating the above matters, prayed that the two sums of 1,872*l.* 1*l.* 3*d.* £3 per Centum Consolidated Bank Annuities might be secured in Court for the benefit of the persons entitled thereto, and that the rights and interests of all parties therein might be declared, having regard to the circumstances therein mentioned, and that, so far as might be necessary, the second suit might be deemed and taken as supplemental to the suit of *Noble v. Brett*.

An

1857.

  
NOBLE  
v.  
BRETT.

An order was made, on the 27th *January*, 1857, in common law action, that all further proceedings therein should be stayed, on the terms, that the Plaintiff *Dyson* should come in to prove his claim in the suit of *Noble v. Brett*, and that the costs of the action should abide the result of such proof.

The chief clerk by his certificate, made in the first cause *Noble v. Brett*, dated 30th *March*, 1857, and duly approved and filed, certified, that the only debt of the testator remaining unpaid was one of 207*l.* 19*s.* 7*d.*, due to *Dyson* in respect of the breach or non-performance of the covenants contained in the lease. That the personal estate of the said testator, applicable for the payment of such debt, consisted of—first, the sum of 308*l.* 8*s.* 11*d.* received by *Sarah Brett* in the year 1846, as residuary legatee; secondly, the two sums of 1,872*l.* 11*s.* 3*d.* Bank Three per Centum Annuities, standing in the bank in the names of the executors and legatees, arising from the amounts invested by the executors of the testator's will, in respect of the two legacies of 2,000*l.*

In *July*, 1857, an order was made in the first cause, that *Sarah Brett* should pay the sum of 308*l.* 8*s.* 11*d.* into Court, and thereout *Dyson's* debt was ordered to be paid. She made default, was taken under an attachment, and was discharged under the Insolvent Debtors' Act; *Dyson's* debt, therefore, remained unsatisfied.

By an order made on the 1st of *July*, 1857, in the second cause, the two sums of 1,872*l.* 11*s.* Stock were ordered to be brought into Court, and the one carried to "The Contingent Account of *Samuel Hodges* and *Hayley*" and the other to "The Contingent Account of *William Hodges*." The dividends were ordered to be paid as before;

before; but the parties in both suits were to be at liberty to apply, and the fund was not to be transferred out of Court without notice to the parties to the suit. The transfer into Court had not, however, as yet been made.

1857.

NOBLE  
v.  
BRETT.

*Dyson's* debt still remaining unsatisfied, he presented his petition in both causes, detailing the above circumstances, and praying, that the Court might order and direct by whom and out of what fund his debt, interest and costs might be paid to him, and what proceedings, if any, ought to be taken in respect thereof.

That, if necessary, out of each of the said sums of 1,872*l.* 11*s.* 3*d.* £3 per Cents. one moiety of his debt, interest and costs might be ordered to be raised and paid to him.

The petition now came on for hearing.

Mr. *Lloyd* and Mr. *Haig*, in support of the petition, left the point out of what fund the creditor was to be paid to be contested by the executors, the legatees, and *Hayley* the purchaser.

Mr. *Hardy*, for *Hayley* the purchaser. First: The creditor has no right as against this fund. The legacies have been set apart and appropriated, they are severed from the general assets and placed (in conformity with the directions in the will) in the names of the legatee and of the executors, not in their character of executors, but as trustees; *Phillipo v. Munnings* (a). Creditors have no specific lien on the personal assets (b), and therefore cannot follow them in the hands of a legatee where there is a sufficient residue, and, *à fortiori*, they cannot

(a) 2 *Myl. & Cr.* 309.

(b) *Ram.* on "Assets," 591.

1857.

NOBLE  
v.  
BRETT.

cannot recall them from a purchaser<sup>1</sup> for value without notice. The case is stronger in the present instance, for the legacies have been ordered to be carried over to the separate account of the legatees in this suit.

Secondly, an executor who has paid a legacy, or assented to a specific legacy and paid over the residue, has no remedy against the pecuniary or specific legatees. His remedy is against the residuary legatee, and even if he be entitled to relief as against the pecuniary legatee, still he has no right, as against a purchaser, from him. He referred to *Kinderley v. Jervis* (a); *Gillespie v. Alexander* (b); *Williams on Executors* (c); *Taylor v. Hawkins* (d); *March v. Russell* (e); *Cole v. Miles* (f); *Cole v. Muddle* (g); *Dean v. Allen* (h); *Brewer v. Pocock* (i); *Waller v. Barrett* (j); *Greig v. Somerville* (k).

*The MASTER of the ROLLS* called on counsel for the executor as to the second point only.

Mr. G. L. Russell, for *Noble* the executor, argued that an executor who had acted *bonâ fide* ought to be protected against loss out of all the assets. That the fund in question had never been parted with, but was still in the names of the executors and under the control of the Court, and liable to all demands on the estate. That the order to carry over the fund to the separate account did not affect the question, for it reserved liberty to all parties to apply, and directed that it

(a) 22 *Beav.* 1.(b) 3 *Russ.* 130.

(c) Pp. 1216, 1308.

(d) 8 *Ves.* 209.(e) 3 *Myl. & Cr.* 31.(f) 10 *Hare*, 179.(g) 10 *Hare*, 186.(h) 20 *Beav.* 1.(i) 23 *Beav.* 310.(j) *Ante*, p. 413.(k) 1 *Russ. & M.* 338.

it should not be paid out without notice, which gave all the parties the benefit of a stop order. He referred to *Anon. (a)*; *Knatchbull v. Fearnhead (b)*.

1857.

NOBLE  
v.  
BRETT.

*The MASTER of the ROLLS.*

There are some points in this case which I wish to look into, but as to a considerable portion I entertain no doubt.

It is admitted that no objection of form is to be taken on this occasion, and that therefore it is not necessary to file a bill to determine the rights of all parties. Another thing, which is admitted, or if not, is clear, is, that somehow or other the creditor must be paid. But the question on which I entertain some doubt is, as to the liability to pay, as between the executor and the purchaser of the interest of the legatee. It is clear that as the assets have been distributed by the executor on his sole responsibility, he is, in the first instance, personally liable to pay the debt (c); but if he would be entitled to come against the fund in Court for repayment, it would be for the interest of all parties that the fund should be made liable at once, without going through the form and ceremony of further proceedings. I have no doubt that assets in the hands of a legatee may be made liable for the payment of debts, but if he has parted with those assets to a purchaser without notice of any existing claims, the purchaser who has got possession of them could not be compelled to refund them or made liable for the payment of the claim. Accordingly, as I have stated, if this money had been paid to *Hayley*, it would be very difficult to get it back.

I think the question depends on the peculiar circumstances

(a) 1 *P. Williams*, 494.

(b) 3 *Myl. & Cr.* 122.

(c) See 22 *Beavan*, 367.

1857.

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 NOBLE  
 v.  
 BRETT.

stances relating to the fund in Court. It is really a question between co-Defendants, but I think I can deal with the matter on the merits, without regard to form.

I think *William Hodges* ought to be here.

Mr. *Lloyd*. He has been served with the petition.

1858.

Jan. 13.

*The MASTER of the ROLLS.*

This is a petition by a creditor of *Samuel Hodges*, deceased, seeking payment out of certain funds in Court, alleged to be assets belonging to the estate of that testator, which has been, or is now, in course of administration in this Court.

The testator *Samuel Hodges* died in *March*, 1846, leaving his widow *Sarah Brett* the Defendant, *William Noble* the Plaintiff, and *Joseph Davis*, his executors. By his will, the testator gave a sum of 2,000*l.* to each of his two sons, *Samuel* and *William Hodges*, and directed those amounts to be invested in the public funds and paid to the sons as they attained their ages of twenty-five years respectively, and he gave the residue to his widow. These sums were duly invested in the purchase of two sums of 1,872*l.* 11*s.* 3*d.*, £3 per Cent. Consolidated Annuities, one in the names of the three executors and the son *Samuel*, and the other in the names of the three executors and the son *William*, and the clear residue, amounting to about 300*l.*, was paid over to the widow and residuary legatee.

The testator had been lessee of a house, under a lease dated 25th of *October*, 1824, for thirty-one years from *Michaelmas*, 1824, and which consequently expired on the



the 29th of *September*, 1855. The lessors conveyed the property to the Petitioner as a trustee, for the separate use of *Eliza*, the wife of *John Laurie*. On the expiration of the lease, the estate of the testator became liable, under the covenants contained in the lease, to make good the breaches which had been committed in respect thereof.

1858.

  
NOBLE  
v.  
BRETT.

The Petitioner instituted his action at law on the covenant against the Plaintiff, as the executor of the lessee, and the Plaintiff, thereupon, on the 10th of *July*, 1856, filed his claim in this Court for the administration of the estate of his testator, and a decree was made accordingly on the 24th of *November*, 1856.

In *December*, 1856, the Plaintiff filed a bill in this Court, stating the will, the investment of those sums, the incumbrances created on one of them, the circumstances above referred to, and praying, that these two sums of 1,872*l.* 11*s.* 3*d.* Consols, and the dividends, might be secured in Court, for the benefit of the persons who might be declared to be entitled thereto, and praying such declaration of right accordingly.

On the 27th of *January*, 1857, the action at law was stayed by the order of one of the judges of the Court of Queen's Bench, on the terms that the Petitioner should come in the suit to prove his debt, and that the costs of the action should abide the result of such proof.

On the 30th of *March*, 1857, the Chief Clerk made his certificate, finding 207*l.* 19*s.* 7*d.* due to the Petitioner; that this was the only debt; and that the estate of the testator applicable for the payment of it was, first, the 308*l.* 8*s.* 11*d.* received by the widow as residuary legatee, and next the two sums of 1,872*l.* 11*s.* 3*d.* Consols.

On

1858.

NOBLE  
v.  
BRETT.

On the 1st of *July*, 1857, the Court ordered *Mrs. Brett* to pay the amount of 308*l.* 8*s.* 11*d.* into Court, and out of it, when paid in, directed the costs to be paid, and then the debt of the Petitioner. This order has not been complied with, *Mrs. Brett* has become insolvent ; she has been discharged under the act, and her estate is unable to pay any portion of this amount. On the same day the second mentioned suit came on to be heard, the Court thought it was unnecessary, and that all that could have been required might have been obtained in the first suit, but it made an order for payment of the two sums into Court, one to be carried to the contingent account of the son *Samuel*, and his assignee *Thomas Hayley*, and the other to be carried to the contingent account of the son *William*, and the dividends of the first sum were ordered to be paid to *Hayley* and those of the second sum to *Mrs. Brett*, for the maintenance of her son *William* ; and it was further ordered, that those several sums of Stock should not be paid out of Court without notice to the Plaintiff and Defendant in the last-mentioned suit of *Noble v. Brett*

In this state of things, the Petitioner (*Mr. Dyson*) presents his petition, asking for payment of his debt, and that, if necessary, it may be paid out of the two sums of Stock ordered to be paid into Court in the second suit.

This is opposed on the part of *Hayley*, the incumbent, or rather the purchaser of the sum set apart for the legacy of *Samuel*, on the ground that he is a purchaser of that legacy for value, without any notice of the Petitioner's claim, or indeed any possible belief that he would not be entitled to the legacy if *Samuel* attained his age of twenty-five years.

He contends, in support of his claim, that so far as the Petitioner is concerned, a general creditor can have

no

no specific lien on the assets of the testator, and that he cannot follow them into the hands of the legatees, and still less into those of the purchaser from them; but that the creditor's remedy is, in such case, confined to a personal remedy against the executors. Assuming this to be the principle which is applicable to the present case, practically the Petitioner must be paid, and ultimately, in my opinion, this question will resolve itself into a contest between Mr. *Noble*, the executor, and Mr. *Hayley*, the incumbrancer, as purchaser of the legacy of *Samuel*; because I cannot doubt that the Petitioner is, in any view of the case, entitled to be paid his debt. The Judge at Law stopped the action, and made the costs of it depend on the fact whether the Plaintiff could establish his debt in Equity; he has done so, and the propriety of the certificate is not objected to, or his debt disputed; and although the Judge did not (as is usual in Chancery as a condition for staying the action), direct judgment to be entered up for the Plaintiff in the action, to be dealt with as the Court of Chancery should direct, yet I cannot doubt, that the Petitioner is to be treated here in exactly the same situation as if he had recovered a judgment against Mr. *Noble*, and that if no other means of payment is open to the Petitioner he is entitled to the benefit of a personal remedy against the executor Mr. *Noble*. If that should be so, is Mr. *Noble*, the executor, in that case, to bear the loss himself, or if not the whole, is he to bear any portion of the loss, and if so, to what extent? He has been guilty of no intentional breach of trust, nor has he, in any respect, failed in his duty, unless it be a failure, in that respect, not to set apart assets to meet a possible contingency, which no one knew of or anticipated.

But, on the other hand, it is contended that he must  
VOL. XXIV. L L take

1858.

NOBLE  
v.  
BRETT.

1858.

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NOBLE  
v.  
BRETT.

take the consequence of not having acted under the authority of this Court, and that an executor having once assented to a legacy and parted with the fund has thereby lost all right to follow it, or to obtain a restitution of the fund itself, and that his remedy is confined to a personal remedy, by action, against the legatee to whom he has paid or delivered the legacy, which remedy, in the present case, would be futile.

This, which is a question involving considerations of some nicety, I do not consider myself called upon to decide on the present occasion, because, admitting the correctness of Mr. *Hardy's* premises on the present occasion, and that the right of the creditor and that of the executor to attach the fund itself is limited to the case where the executor or the Court has not parted with the control over it, I am of opinion that in this case the executor has not parted with his dominion over the fund, but that the Court has possession of it for the purpose of administering the estate of the testator. I think it immaterial, for this purpose, whether the orders of the 1st of *July*, 1857, directing these two sums to be brought into Court, have or have not hitherto been acted upon; they may be enforced, and I shall deal with this case in the same manner as if they had been carried into effect. Before the suit was instituted the fund stood in the names of the three executors and the legatee who had not attained the age when he was entitled to receive the capital, and the dividends were applied for his maintenance. It is argued, that this was as complete a payment as if three other persons had been constituted trustees, into whose names the funds had been transferred, that as soon as the transfer took place, the office of executor ceased and that of trustee began, as it did in the case of *Phillipo v. Munnings* (a), and to a certain extent this is undoubtedly true,

(a) 2 *Myl. & Cr.* 309.

true, but I consider it to be impossible to hold, that in consequence of such transfer the executor is bound, personally, to pay any debt of his testator which he was ignorant of, and that, although assets of that very testator are standing in his name jointly with that of others, he must be driven to an action against the *cestui que trust* to recover payment of the debt, or of his proportion of it. He is, no doubt, bound justly to apportion the debt amongst the persons equally liable to contribute, and he must also exhaust the funds primarily liable for this purpose, and the principal difficulty I felt in this case during the argument arose from this circumstance—whether the question did not now arise as to the propriety of the payment made by the executor to the residuary legatee, and whether the legatees are not entitled to say to the executor “you have paid away the residue, which is the fund primarily applicable to the payment of this debt, and you have done so in your own wrong, and because you cannot repair the effect of your own incaution, you are not entitled to make us pay for it, any more than you would be entitled, if the funds were all here or if there were no residue, to throw the whole debt on that particular legacy which has not been parted with by the legatee.” If I thought that Mr. *Hayley* was to be treated as the purchaser of a fund or legacy which had been paid or delivered to the legatee, I should find it extremely difficult, consistently with authority or principle, to make him pay any portion of the debt, and in that case it would be equally difficult to make the remaining legatee pay the whole debt. And if, according to principle and authority, it is settled that the legatee is only liable to pay his proportion of the debt, without regard to the fact whether the remaining proportion can be recovered from the other legatees, who  
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1858.

NOBLE  
v.  
BRETT.

1858.

NOBLE  
v.  
BRETT.

are equally liable, it would seem difficult to hold, that the same principle did not also apply to the case of a residue, where the residuary legatee had received the fund which was primarily liable for payment of the debt.

I am, however, as I before observed, relieved from deciding this question at present, because, in my opinion, the order of this Court I have already referred to places the funds under the authority of this Court for the administration of the testator's estate, and the certificate, which has been duly approved and is not contested, finds these sums to be specifically applicable to the payment of this debt of the Petitioner.

I am of opinion, therefore, that Mr. *Hayley* cannot, as the fund still remained in the names of the executors together with that of the legatee, successfully contend that they have parted with all control over it, or that it was freed from all claims in respect of the testator's estate, as he might have done if the fund had been actually paid or transferred to the legatee. Mr. *Hayley* made no inquiry of the executors, and did not act on the faith of any assurance made by them to the effect that he might safely advance his money upon the security of this legacy, nor has he or any other person disputed the accuracy of the certificate.

I am consequently of opinion, that the Petitioner is entitled to be paid his debt out of these two sums, whatever may be the rights of the legatees or of the persons claiming under them, if any, as against the executor, which is a question that does not properly arise before me on this petition. I shall therefore, on the present occasion, make an order which will be substantially according to the prayer of the petition, viz.—Order —  
payment==

payment of the amount found due to the Petitioner, together with the costs of the petition, to be paid in equal moieties out of the two sums of 1,872*l.* 11*s.* 3*d.*, and for this purpose the Petitioner is to be at liberty to prosecute the order of the 1st of *July*, 1857. This order is to be without prejudice to any question in the cause, and let the costs of all the Respondents to this petition be costs in the cause.

1858.

NOBLE  
v.  
BRETT.

NOTE.—See *Davies v. Nicholson*, Lords Justices, 10th *July*, 1858.

JEANS v. COOKE.

1857.

Dec. 2, 3, 16.

THE question in this case had reference to a copyhold estate, held of the manor of *Pitton and Farley*, in the county of *Wilts*, and arose under the following circumstances:—

A father purchased a copyhold, and was admitted thereto to hold during the lives of his three children, *A.*, *B.* and *C.* successively. *B.*, after the death of the father and *A.*, got admitted, whereupon the Plaintiff, who claimed under the father's will, instituted a suit to have *B.* declared a trustee for him. As an excuse the

In 1809 *Henry Cooke*, the father, purchased the property, and was admitted thereto, "to hold the same unto the said *Henry Cooke* for the lives of *Henry Cooke*, aged seventeen years, *George Cooke*, aged eight years, and *James Cooke*, aged seven years (his three sons), and for the life of the longest liver of them successively, at the will of the lord, according to the custom," at an annual rent of 1*l.* 8*s.*, and a heriot on the death of each of them the said *Henry Cooke*, the son, *George Cooke*, and *James Cooke*. *Henry Cooke*,

the for not proceeding at law, the Plaintiff alleged a custom of the manor, by which the *cestui que vie* was entitled to be admitted; this was disputed. Held, that even assuming the custom, still, by the form of the grant, the father had made an advancement to his sons, who were therefore entitled beneficially, and not as trustees for their father.

The evidence to rebut the presumption of an advancement, in the case of a purchase by a father in the name of a child, ought to be distinct and contemporaneous.

1857.

JEANS

v.

COOKE.

the father, as sole purchaser, paid the lord a fine of 1,200*l*.

The father cultivated the farm until 1832, when *George*, his son, became his tenant.

*Henry*, the father, devised all his estate and interest in the property to his son *Henry*, and died in 1835.

In 1836 *Henry* the son was admitted for the term of his life, and *George* continued his tenant. *Henry* died in 1855, having devised the estate.

In 1856 *George*, as one of the lives on the original grant of 1809, was admitted to the copyholds for the term of his life, and claimed them beneficially under the original grant.

Whereupon the Plaintiffs *Jeans*, who claimed the property under the will of *Henry* the son, instituted this suit against *George*, to have it declared that *George* was a trustee for them.

The Plaintiffs contended that the father was the absolute owner of the estate, and that his three sons were trustees for him. They alleged that they were unable to proceed at law against the Defendant, because, by a custom of the manor, the first *cestui que vie* on the rolls was entitled to admittance. They further insisted that the acts and circumstances shewed that the father did not intend to make an advancement to his sons.

The Defendant contended that there was no such custom alleged or proved, and that the proper course for the Plaintiffs to take was to proceed by action at Law; secondly, that even if such custom really existed, then



then that the effect of the insertion, by the father, of his children's names, in the admission of 1809, was to create an advancement in their favour, and not to make them trustees.

1857.

JEANS  
v.  
COOKE.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *W. W. Cooper* cited as to the custom *Doe d. Nepean v. Goddard* (a); *Right d. The Dean and Chapter of Wells v. Bawden* (b); *Lewis v. Lane* (c); *Smith v. Baker* (d).

As to advancement they cited *Finch v. Finch* (e); *Sheats v. Sheats* (f); *Murless v. Franklin* (g); *Scawin v. Scawin* (h); *Prankerd v. Prankerd* (i); *Smith v. Warde* (j); *Edwards v. Edwards* (k).

Mr. *Selwyn* and Mr. *C. Hall* for the Defendants, referred to and commented on the following cases:—*Anon.* (l); *King v. The Lord of the Manor of Hexham* (m); *Lewis v. Lane* (n); *Sheats v. Sheats* (o); *Dyer v. Dyer* (p); *Scawin v. Scawin* (q); *Grey v. Grey* (r); *Finch v. Finch* (s); and see *Sidmouth v. Sidmouth* (t); *Christy v. Courtenay* (u); *Lewin on Trusts* (x).

Mr. *R. Palmer* in reply.

The MASTER of the ROLLS:—I will consider the case.

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| (a) 1 <i>Barn. &amp; C.</i> 522.       | (l) <i>Loffl. Rep.</i> 390.             |
| (b) 3 <i>East</i> , 260.               | (m) 5 <i>Ad. &amp; El.</i> 559.         |
| (c) 2 <i>Myl. &amp; K.</i> 449.        | (n) 2 <i>Myl. &amp; K.</i> 449.         |
| (d) 1 <i>Atk.</i> 385.                 | (o) 2 <i>Yo. &amp; Col. (C. C.)</i> 9.  |
| (e) 15 <i>Ves.</i> 43, 50.             | (p) 2 <i>Cox</i> , 92.                  |
| (f) 2 <i>Yo. &amp; Col. (C. C.)</i> 9. | (q) 1 <i>Yo. &amp; Col. (C. C.)</i> 65. |
| (g) 1 <i>Swan.</i> 13.                 | (r) 2 <i>Swan.</i> 594.                 |
| (h) 1 <i>Yo. &amp; C. (C. C.)</i> 65.  | (s) 15 <i>Ves.</i> 43, 50.              |
| (i) 1 <i>Sim. &amp; St.</i> 1.         | (t) 2 <i>Beav.</i> 447.                 |
| (j) 15 <i>Sim.</i> 56.                 | (u) 13 <i>Beav.</i> 96.                 |
| (k) 2 <i>Yo. &amp; Col. (Ex.)</i> 123. | (x) <i>Page</i> 214 (3rd ed.)           |

1857.

JEANS

v.

COOKE.

Dec. 16.

*The MASTER of the ROLLS.*

This is a bill filed to have it declared, that the Defendant, who has become admitted to certain copyhold hereditaments held of the manor of *Pitton and Farley*, in the county of *Wilts*, is a trustee of them for the Plaintiffs.

The case made by the bill is, that the Plaintiffs' testator was absolute owner of the copyholds for the lives of his three sons, *Henry*, *George* and *James*, and the life of the survivor; that he enjoyed the copyholds during his life, and devised them to *Henry*, one of his sons; that *Henry* was admitted and enjoyed them during his life under his father's will; that *Henry* devised them to *Charles*, who devised them to the Plaintiffs; but that since the decease of *Henry*, *George*, the second son, procured himself to be admitted, and has since held and now holds them to the exclusion of *Charles* and his devisees. If this were all the case, *George*, who has got admitted since the death of *Henry*, would have obtained such admission wrongfully, and the devisees of *Charles* might bring ejectment against *George*, and thereby, or by other action at law, evict him from the premises. But the bill alleges, or rather the counsel in support of the Plaintiffs' case allege, that the Plaintiffs are precluded from adopting this course by reason of this circumstance: that there is in this manor a custom, by which, when a person is admitted to a copyhold held of this manor for the life of another, or for the lives of two or three others and the life of the survivor, on the death of the person so admitted, the *cestui que vie* or the first of the surviving *cestuis que vie* on the rolls is entitled to be then admitted by the lord, and may demand and compel this as of right. In support of the allegation of the existence of this custom,

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the court rolls of the manor are produced, beginning on the 30th *September*, 1794, and going down to 13th *April*, 1828, in which a variety of entries are produced consistent with the allegation made by the Plaintiffs as to the custom of the manor, and none of which are inconsistent with that allegation.

1857.

  
JEANS  
v.  
COOKE.

On the part of the Defendant, the defence is twofold: he contends, first, that the custom is neither alleged by the bill, nor proved in evidence, and that the existence of such a custom is not to be presumed against him, who has had no means of contesting that which has not been put in issue. That in the absence of any such custom, which is to be presumed, the proper remedy for the Plaintiffs is at Law, either by action of ejectment or in an action against *George*, as tenant of the copyhold, for use and occupation.

If he fail in that contention, the Defendant insists, that if the Plaintiffs are to be at liberty to go into the question of the custom, and if the Court should consider the evidence produced sufficient to establish it, that in that case, the fact that the testator (cognisant of this custom and the rights thereby conveyed to the *cestui que vie*) should have put his three sons' *Henry*, *George* and *James* names on the rolls, as the lives on which the copyholds were held, amounts to a case of advancement in their favour, and precludes any right in the Plaintiffs.

On the first point, it must be admitted that on the pleadings nothing can be more meagre than the case of the Plaintiffs; there is not an allegation in the bill respecting the custom or the right of *George* to be admitted in consequence of the form of the grant to his father. The Defendant insists that this is essential to the  
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1857.

JEANS  
v.  
COOKE.

the Plaintiffs' case, and that if they had made such an allegation in his bill, the Defendant would have been at liberty to go into evidence, for the purpose of shewing that no such custom existed, and that the right of the Plaintiffs, if any, was enforceable only at Law.

Certainly the state of the pleadings is too vague, and the evidence before me far too slender, to enable me to come to any satisfactory conclusion as to the existence or the validity of any such custom. No person gives any evidence on the subject; all the evidence there is is to be picked up from ambiguous entries on the rolls of the manor for the period of thirty-five years, extending over the first quarter of the present century. Even the fact, therefore, of the custom is not properly before me, and if it were, I have not the means to determine (if this were the proper occasion for me to do so) on the validity of any such custom. In the case of *Doe d. Nepean v. Goddard (a)*, it was held that a custom similar to that alleged here was a good custom, provided it was operative only in default of any devise made by the owner of the copyhold.

It is suggested that there is no custom in this manor recognizing devises, but on this subject the evidence is a blank, with the exception, that one case of an admittance under a will appears on the rolls produced before me. It would seem, therefore, by inference from the case cited, that the custom was not a good one, and did not apply to the case, where, according to the custom, copyholds might be devised and a devise had been made of the copyhold in question.

*Right d. The Dean and Chapter of Wells v. Bawden (b)* was a case where a grant by copy of court rolls

(a) 1 *Barn. & C.* 522.

(b) 3 *East*, 260.

rolls of a reversion had been made to one who had before a life estate in the premises, to hold to him for the lives of two grandsons during the life of the longer liver, according to the custom, reserving a heriot and 6s. rent: it was held, that the grantee alone took the legal estate in the reversion, and not the *cestuis que vie*, inasmuch as there was no custom to enable them to take, although they were stated to be admitted tenants in reversion.

1857.

JEANS  
v.  
COOKE.

In *Edwards v. Fidel* (a) this custom was set up, viz., that when a tenant for life of copyholds obtained a grant in reversion, in the name of a third person, without stating any trust on the rolls of the manor, such third person was to be beneficially entitled to the copyhold, and Sir *John Leach* held it to be a good custom.

In *Lewis v. Lane* (b) Lord *Cottenham* overruled that decision, and in doing so, seems to doubt the validity of any such custom. He held the person admitted to be a trustee for the beneficial owner, a decision only to be arrived at on the assumption that the custom was sufficiently strong to prevent the question being tried at law.

In this state of the facts, and the authorities, I should feel considerably embarrassed if I were of opinion that I could properly now decide on the validity of any such custom; and this circumstance would also have created a great difficulty as to the form of any order I could have made on the present occasion, had I not, on the assumption of the existence and validity of the custom alleged at the bar to exist in the manor, come to the conclusion, that the facts amount to an advancement by the

(a) 3 *Mud.* 237.(b) 2 *M. & K.* 449.

1857.

JEANS

v.

COOKE.

the father in favour of his three sons, *Henry, George* and *James*.

The case is this:—A father obtains, for value, a copyhold grant, to hold to him for the lives of his three sons, *Henry, George* and *James*, and the life of the longest liver, with a heriot payable on the death of each life. The grant contains no words of inheritance or limitation; it is not to *Henry Cooke*, and his heirs and assigns, or to him and his executors, administrators and assigns, during the lives of his three sons and the life of the survivor, but it is to *Henry Cooke simpliciter*. He knew that the custom was, that upon his death, his son *Henry*, if living, must be admitted, and that no one could dispute this right; he knew that on *Henry's* death *George*, if alive, must also be admitted in like manner; and that if *James* were alive when *George* died, the same result must follow with regard to him. This appears to me to be equivalent to a limitation of the hereditaments to himself for life, remainder to *Henry* for life, remainder to *George* for life, remainder to *James* for life. If the father had bought freeholds, and had caused them to be so limited, there could not be, in my opinion, any question, but that such limitation would, taken by itself, have amounted to an advancement in favour of his three sons. This is exactly similar to it in all respects; the custom of the manor, of which the father was cognizant, supplying the necessity of limitations to be contained in the deed, if it had been a conveyance of freeholds in the case I have suggested. It is true, that this is a presumption arising from the form of the instrument conveying the property, coupled with the moral obligation which a father is under to provide for his children, a presumption that shifts the burthen of proof, and repels what would otherwise be the ordinary presumption of any such transaction, viz., that the person  
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who pays the money is the owner, and that all others are trustees for him. Still, however, as it is a presumption, it may be repelled by evidence, and, in my opinion, the burthen of proof lies on the Plaintiff to rebut the presumption, by evidence sufficiently strong to lead to an opposite conclusion.

1857.

  
JEANS  
v.  
COOKE.

This leads me to consider the evidence relied on by the Plaintiff for this purpose. Evidence of parol declarations by the father there is none on either side, for I consider the evidence adduced by the Defendant for this purpose as nothing. The evidence ought to be distinct, because, as observed in several cases, this is a principle which is not to be frittered away by nice refinements.

The evidence ought to be contemporaneous, or nearly so, because subsequent acts or subsequent declarations by a father will not enable him to convert an advancement for his son into a beneficial purchase for himself. This principle, of course, does not apply to subsequent acts and declarations of the son, which may be used for the purpose of shewing that he considered himself only to be a trustee.

In the present case, the evidence, so treated and considered, amounts to nothing; the grounds relied on by Mr. *Cooper* as sufficient evidence to support the Plaintiffs' case were,—first, the form of the grant; second, the occupation of the father; third, the tenancy of the son *George*; fourth, the will of the father; fifth, the will of *Henry*.

The first three were those mainly relied upon, but in the view I take of this case, the first is that which establishes the case of the Defendant, and the other two  
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1857.

JEANS  
v.  
COOKE.

are merely consistent with it. The first is the form of the grant. If any case of advancement exists, it can only be as it arises from the form of the grant, coupled with the custom of the manor. I have already remarked, that on the assumption that this custom existed, the father must be assumed to have known of it. Knowing this, he obtains, for valuable consideration, a grant of copyholds, which, according to the custom of the manor, must, taken by itself, be treated simply as a grant to the father for life, with remainder to his three sons in succession. The testator, therefore, knew and intended his sons to take after him, and there appear to be grants in a similar form in the same manor. The truth, no doubt, is, that the whole case turns on the form of the original grant, coupled with the existence of the alleged custom in the manor; assuming the validity of the custom, it is this form of admittance which constitutes the right of the Defendant. There is, as I observed, no limitation or indication of any estate being preserved to the father after his death, his interest is simply to cease on his death. *Henry* could not claim admittance under the grant during the life of the father, because the father had been admitted and was in possession. The son, therefore, could only be admitted when the father died, for there is no allegation that the custom of the manor was, that when a man was admitted for the lives of three others, or the life of another, the *cestuis que vie* could evict the person admitted, and secure an admittance to themselves, and such an allegation would be contrary and repugnant to the form of any such grant itself. Besides which, this form of grant is supported by other similar ones in the copies of court rolls furnished to me, which shews, that the person admitted to hold for the lives of others himself took the first estate. If so, the father necessarily had the first legal estate in the hereditaments, and his enjoyment



ment and occupation was in strict accordance with the terms of the grant. All that can be gathered from the rolls is, that after the death of the beneficial owner it has been the practice, in such case, to admit the *cestuis que vie* in succession, giving them, therefore, estates in succession after the father. A custom that the person admitted should be a trustee for the *cestuis que vie* would be inconsistent with the rule of copyholds and court baron, which, as is justly observed, do not deal with trustees at all. It is clear, therefore, that the form of this grant must be taken to be a grant beneficial to the father for his life but no longer, and the custom supplies the successive life estates to the sons.

If I am right in this view of the case, it disposes of the other circumstances relied upon as evidence for the Plaintiffs. The occupation by the father is consistent with the form of the grant, which gives the beneficial interest to him in the first place, and after his death to his sons in reversion after him, and after each other. So, in like manner, the tenancy of the son *George*, under the father, and the son *Henry*, is quite consistent with their being entitled to the beneficial occupation of the hereditaments in succession, first the father, and afterwards the son.

The will of the father, devising the copyholds to *Henry*, is undoubtedly inconsistent with the grant, and with the custom as alleged, but I am of opinion, that this cannot prevail over the circumstances I have already referred to, having regard to the fact that it was long posterior, and that it cannot govern the original transaction, if that amounts to advancement. It is also to be observed, that although there is a case, on the rolls before me, of an admittance under a will, and therefore it should seem that this course was open to  
*Henry*

1857.

JEANS  
v.  
COOKE.

1857.

JEANS  
v.  
COOKE.

*Henry* the son, yet he was not admitted under the will of his father, but was admitted *simpliciter*, and, as it should appear, according to the custom.

He, no doubt, afterwards devised the lands by his will, but this act in his own favour, for it must be so treated, cannot have any weight in determining the effect of the original transaction.

The consequence is, that as far as in the absence of positive and precise allegation of the custom on the face of the bill, which the Defendant was entitled to require, and as far as that custom can be gathered from the entries of the court rolls produced, and assuming the validity of that custom, I am of opinion, that a case of advancement is made out, and that the case of the Plaintiffs fails.

But I am by no means clear either of the existence or of the validity of the custom, and I do not mean to prejudice the Plaintiffs by any order I now make on this subject, which has not been properly put in issue on either side. So far as the Plaintiffs allege it, and support it by evidence, I am of opinion that it destroys their case, and that their bill must be dismissed, but in doing so, I shall couple it with a declaration, that it is to be without prejudice to any action which the Plaintiffs may be advised to bring against the Defendant relating to the copyholds.

The Plaintiffs must pay the costs of the suit.

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1857.

IRBY v. IRBY.

IN 1786, upon the marriage of Sir *Wm. C. De Crespigny* (since deceased), certain moneys were settled in the usual way on the parents for life, with remainder to the children, as Sir *William* should appoint. In 1805 the trustees of the settlement lent to Sir *William* 13,000*l.* part of the trust moneys on a mortgage of his real estates. Sir *William* died in 1829, having by his will appointed the trust fund to his children, and having nominated the Defendant *Paul A. Irby* and his son *Herbert J. C. De Crespigny* executors. The 13,000*l.* not having been paid, this suit was instituted in 1830, by one of the married daughters, mainly for the purpose of administering the testator's estate, and also to obtain payment of the 13,000*l.*, and involving the execution of the trusts of the settlement of 1786.

The decree was made in 1832, and the mortgaged estates had been sold in the suit.

No receiver was appointed, and after the decree, the executors had, out of the mixed fund, composed partly of the rents of the real estate and partly out of the general personal

Dec. 18, 19, 22.

If, after a decree, an executor thinks fit to pay a creditor, he does so at his own risk, and he is only entitled to stand in the place of his creditor against the estate.

The testator had mortgaged his real estate to secure moneys held on the trusts of his marriage settlement. A suit was instituted to administer his estate and to realize the mortgage. After the decree (in 1832), the executors advanced considerable sums, out of the rents and personal estate, on

account of interest, to the persons entitled to the mortgage. The estate proved deficient to pay all the creditors. Held (in 1857), that the payments could not be justified, that the executors must repay the amount, and be charged with interest on the balances composed of the money so improperly paid by them.

Trust moneys were lent on mortgage to the tenant for life. On his death a suit was instituted mainly for the administration of his estate and also the realization of the mortgage, and involving the execution of the trusts of the settlement. Held, that the costs ought to be paid as of an administration suit out of the assets; but that the costs, so far as they had been increased by its being a suit for the execution of the trusts of the settlement, must be borne by the settlement fund.

1857.

IRBY  
v.  
IRBY.

personal estate received by them, paid and retained to themselves, and other the parties beneficially entitled to the settlement money, sums amounting to 7,215*l.* on account of interest, but which the Master by his report had disallowed.

When the cause came on for further direction in *November*, 1856 (a), the Court declared, that the principal sum of 13,000*l.*, lent to the testator upon mortgage, together with interest thereon, from the death of the testator, was a primary charge upon so much of the sum of 28,296*l.* 3*s.* 8*d.* Bank £3 per Cent. Annuities in Court as had arisen from the produce of the sales of the estates comprised in mortgage securities, and from the interest and accumulations of interest thereon.

The Court also directed an inquiry of what the funds in Court now consisted, and how much thereof was derived from real estate and how much from personal estate; and also an inquiry, whether any and what sums had, from time to time, been paid or retained by the Defendants *Paul Anthony Irby* and *Herbert Joseph Champion De Crespigny* in respect of interest on the mortgage debt of 13,000*l.*, or on account of the parties entitled thereto. An inquiry was also directed as to the balance in the executors' hands from time to time; and the general personal estate being deficient, the Court directed an account and sale of the specific legacies.

The Chief Clerk, by his general certificate, answered the inquiries, and found as follows:—The following sums had been paid or retained by the Defendants *Paul Anthony Irby* and *Herbert Joseph Champion De Crespigny*.

(a) See 22 *Beav.* 217.

*Crespigny* on account or in respect of interest on the mortgage debt of 13,000*l.*:—

1857.

*IRBY*  
v.  
*IRBY.*

|                                                                                           | £      | s. | d. |
|-------------------------------------------------------------------------------------------|--------|----|----|
| In respect of the share of the Defendant <i>Paul Anthony Irby</i> . .                     | 736    | 0  | 0  |
| In respect of the share of the Defendant <i>Herbert J. C. De Crespigny</i> . . . . .      | 2,233  | 0  | 6  |
| In respect of the share of the Plaintiff the Rev. <i>John Brigstocke</i> . .              | 632    | 11 | 0  |
| In respect of the share of the Plaintiff <i>Emma H. D. C. De Crespigny</i>                | 3,014  | 12 | 8  |
| In respect of the share of the Defendant the Rev. <i>Heatin C. De Crispigny</i> . . . . . | 598    | 15 | 10 |
| Total . . .                                                                               | £7,215 | 0  | 0  |

The cause now came on for further consideration. The questions raised and the arguments are sufficiently stated in the judgment of the Court.

*Mr. Lloyd* and *Mr. Dryden*, for the Plaintiffs.

*Mr. R. Palmer* and *Mr. Hobhouse*, for the trustees of the settlement.

*Mr. Selwyn* and *Mr. Chichester*, for the executors.

*Mr. Jessell* and *Mr. Hoare*, for specialty creditors of the testator.

*Mr. Bagshawe*, *Mr. Bagshawe, Jun.*, *Mr. Southgate*, *Mr. G. L. Russell*, *Mr. Macnaghten*, *Mr. R. Pryor*, *Mr. Bush*, *Mr. Follett*, *Mr. Smythe*, for other parties.

1857.

IRBY  
v.  
IRBY.

Mr. Lloyd, in reply. As to the costs, *Armstrong v. Storer* (a), and *Tipping v. Power* (b), were referred to.

The MASTER of the ROLLS reserved judgment.

*The MASTER of the ROLLS.*

Dec. 22.

There are three questions I have to consider on the order to be pronounced in this case. The first is, whether the executors of the testator Sir *William De Crespigny* ought to be charged interest on the balances retained by them. Their defence is, that the balances appearing to be retained by them were merely nominal, and that in fact, although certain payments made by them have been disallowed in the progress of the suit, yet such disallowance was merely nominal, because now there is a fund coming to the persons who received these payments more than sufficient to repay the executors, and the whole is arranged as if such payments had been allowed from the first.

If this were so, it would settle the matter, but upon looking into the proceedings in the cause, this does not appear to have been the case. The executors had at their bankers a mixed fund, consisting partly of rents of the real estate (including a portion of that which was not subject to the charge created in favour of the trustees of the marriage settlement), and partly of general personal estate. Out of this fund, they have thought proper to pay various sums, in unequal proportions, to the *cestuis que trust* under the marriage settlement; and they have, in their character of such *cestuis que trust*, themselves retained or paid to themselves portions of

(a) 14 *Beav.* 535.

(b) 1 *Hare*, 405.

of such sums, also in unequal proportions. These payments were disallowed by the Master in his report of the 12th *April*, 1855, no exceptions were taken to that report, and by my decretal order on that report, in *November*, 1855, I did not order that the sum of 7,216*l.* found due from the executors to be paid into Court, but for this reason only, because it was alleged by them, and it is so recited in the order, that they had paid that amount or nearly, from other sources, to persons entitled to receive it, and who would, in that case, simply pay with one hand and receive back with the other. I did not by that order intend to affect the right of any other person under the decree or under the proceedings in the cause, and accordingly, in order to avoid this question being prejudiced by the terms of the decretal order, I omitted from the decree a clause declaring that the money secured by the settlement should be a charge not only on the hereditaments themselves, but also on the rents of such hereditaments accrued due previously to the sale thereof. If these payments are, under the circumstances, to be justified by the event, it would be a hard thing to charge the executors with the repayment thereof and the interest thereon, unless the interests of other persons are prejudiced thereby.

These payments must be looked at in two points of view; they require a separate consideration so far as they are paid out of the general personal estate, and so far as they are paid out of the rents arising from the real estate itself, subject to the mortgage, and which the mortgagee might have taken possession of.

The general principles that affect such payments have not been disputed in the argument. If after a  
decree

1857.

  
IRBY  
v.  
IRBY.

1857.

IRBY  
v.  
IRBY.

decree an executor thinks fit to pay a creditor, he does so at his own risk, and all that he can do is, to stand in the place of the creditor against the estate. In the present case, the executors have paid to the mortgagees 7,215*l.* since the original decree; they are therefore clearly entitled to stand in the place of those mortgagees whom they have paid, to the extent of the sums so paid, and as the mortgagees have funds arising from the sale of the mortgaged estates far exceeding that amount, that amount will have to be recouped by them to the executors, for the purpose of being restored to the estate, unless, when so restored, the mortgagees would be entitled, in that or any other character, to have it back again. As regards the sums paid to the mortgagees out of the general personal estate, this is not disputable, and Mr. *Lloyd* was compelled to admit, in reply, that he could not contest this liability on the part of his clients, and the right which the general body of the creditors would have to enforce the restoration of this fund. But Mr. *Lloyd* made a distinction between so much of this sum as has arisen from the rents of the mortgaged estate, which have been handed over to the mortgagees, and although he does not dispute the general proposition, that a mortgagee is not entitled to any account against a mortgagor for the back rents of the estate accrued before the mortgagee took possession, yet he insists, that when a suit is instituted for the administration of an estate, and a person in receipt of the rents of the mortgaged estate simply hands over the rents to the mortgagee in part payment of his interest, and thereby prevents his taking possession and occasioning expense to the estate, such payment is justifiable and will be allowed by this Court; and that if the Court sees that this has been the effect of the transaction, the mere circumstance, that no application has been made

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for a receiver, which would have been a mere matter of course, but would have resulted in expense, will not affect the rights of the parties.

1857.

Isst  
v.  
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Without contesting this proposition, which, if not universally true, would be adopted by the Court in many cases, and in the majority of instances, it does not, in my opinion, apply to the facts and circumstances of this case. Not only was no agreement entered into, but there was not even any understanding existing on this subject on the part of the mortgagees. The rents of the estate were not, as such, paid to the mortgagees, but payments were made out of a mixed fund, derived from various sources, and these payments were not made to the trustees of the mortgage, who would have been the proper persons to receive and distribute the funds, but payments were made to their *cestais que trust*, and sums retained by the executors, who were also some of the *cestais que trust*, according to an arbitrary discretion, regulated solely by what the executors considered to be the wants of the persons themselves. Such a payment could hardly, in any event, be treated as more than a loan by the executors to persons who were ultimately to become entitled, on the faith and security of being repaid when the persons who had received those advances obtained their shares on the division of the fund. But, in the present case, it is even stronger, for those very payments were disallowed by the Master, and therefore full notice was given thereby to the executors, that they would not be allowed, and yet, in spite of this, they continued to make them. What is of still greater importance, and prevents this from being merely a question as to the practice of the Court, which might, if justice required it, be disregarded, is, that this consequence follows from their act: that if these payments are to be treated as properly made out  
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1857.

IRBY  
v.  
IRBY.

of the estate, they will affect the rights of other parties, will increase the fund applicable to the payment of one class of debts, and diminish the fund applicable to the payment of another class of debts.

I have therefore no hesitation in saying, that although in some cases I might adopt the course urged upon me by Mr. *Lloyd*, this is not a case of that description, and that the *cestuis que trust*, the mortgagees, who have received these sums, must restore them out of the fund arising from the sale of the mortgaged estates, and these sums must be placed to the same accounts as they would have stood, if the executors had paid the money in as soon as the Master had found the balance due from them. As I understand the facts, part of this fund will belong to the general personal estate, and part of it belong to the fund which constitutes equitable assets. These must be separated and made distinct.

It follows from this view I have taken, that the executors must be charged with interest on the balances so retained by them. They state, in their affidavit, that they have derived no species of benefit from this, and that the balances were merely nominal, because they were paid to persons rightfully entitled in the result; but the facts I have stated shew, that this allegation of theirs requires very considerable qualification, for though, as executors, they paid away all the balances they had, yet, as *cestuis que trust*, they retained a considerable portion of it themselves. The principal ground, however, on which I proceed is, that choosing to act on their own responsibility, and in contravention of the direct finding of the Master, they must take the consequences of being compelled to set other persons in the same situation as if they had acted in accordance with the rule and directions of the Court, and not be permitted

mitted thereby to affect the right of third parties. The payments, therefore, must be treated as merely voluntary payments, made at their own risk and on such security as they thought sufficient, and will neither affect or diminish their liability to restore these sums, nor exempt them from the liability to pay interest.

1857.

JURY  
&  
JURY.

If these sums had been paid into Court, they would have been making interest. They ought to have been paid into Court, and would have been so, unless the executors had acted in manner they describe and explain in their affidavit, which they cannot justify, and the consequence is, that they must be charged with interest on their balances at four per cent. per annum, but not with rests, as I should have charged them in case they had used the money for their own benefit, and in this respect I give them the benefit of treating the sums retained by them as if paid to a *cestui que trust*.

With respect to the costs of the suit, I think that it is practically a suit for the administration of the estate of Sir *William de Crespigny*; it does certainly involve, in addition, the execution of the trusts of the settlement, which is a debt against his estate, and in respect of which they seek, besides making the mortgage estate available, to render also the assets of the testator applicable for the payment of what may remain due to them, but the main object of the suit is, in my opinion, the administration of his estate, and the execution of the trusts of his will.

I think, therefore, that the costs must be borne in the manner usual in administration suits, but that the costs of the suit, so far as they have been increased by its being also a suit for the execution of the trusts of the settlement, must be borne by the settlement fund. The Tax-  
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1857.

IRBY  
v.  
IRBY.

ing Master will judge of the extent of this, which may probably be considerable. The trustees of the settlement will have their extra costs, between solicitor and client, out of their settlement fund. The way in which my decree will be worked out, when the figures are ascertained, will be as follows:—In the first place, tax and pay the costs of all parties out of the funds in Court in the manner I have directed; then carry over from the 28,296*l.* in Court, the produce of the sale of the mortgaged estate, the sum of 7,215*l.* (paid by the executors to the *cestuis que trust*) to the accounts to which they would have stood if they had been properly paid in at the times when received, that will be part to the account of the equitable assets and another part to the account of the legal assets. Mr. *Whiting* has given me the figures, but I forbear to go into these details for the reason I am about to state. When this is done, the amount due from the executors for interest must be ascertained, and the amount paid into Court and apportioned between the two accounts, the equitable assets account and the legal assets account, according as the balances have been derived from these sources; then the balance of the 28,296*l.*, arising from the real estate, will be divided amongst the *cestuis que trust* according to their shares, taking into account what each one has already received from the executors, for which he is to give credit, so as to recoup the fund the sums carried over. The legal assets will then be applied in payment of the debts, according to their priorities, including what of the mortgage debt may remain unpaid, and then the equitable assets will be applied also in payment of the debts which remain unpaid *pari passu*.

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1857.

## HUMBLE v. HUMBLE.

Nov. 3.

THE testator, after giving certain legacies, devised his real estates to *Charles Brandling* and *Charles John Brandling*, for the term of five thousand years, to commence from the time of his decease, upon trust, "by mortgage or sale of all or any part of the premises comprised in the term or by the rents and profits thereof in the meantime, or by such other ways and means as they should think fit, with all convenient speed after his decease, from time to time, as it should be necessary, to levy and raise all such sum and sums of money as should be sufficient to pay and satisfy all such part of his just debts, funeral expenses, legacies, annuities, and portions thereinbefore given and bequeathed as his personal estate should fall short or be deficient to pay;" and also the costs of the execution of the trusts; and also pay the surplus of the rents to his three sons, *Joseph Humble*, *John Humble* and *Thomas Humble*, their heirs and assigns, in equal shares. And he declared that when the trusts of the term of five thousand years should be fully satisfied, the term should cease. And he devised the reversion and inheritance of the premises comprised in the term, and subject thereto and to the trusts thereof, unto his sons *Joseph Humble*, *John Humble* and *Thomas Humble*, their heirs and assigns for ever, as tenants in common, and he appointed them his executors.

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payment or acknowledgment. The estate was sold, and the surplus was in Court. Held, in 1857, that *A. B.*'s claim was barred by the Statute of Limitations, and that it was not protected either by the prior term or the pending litigation.

A testator devised his real estate to trustees for a term of 5,000 years, to raise the deficiency of his personal estate to pay his debts and legacies, and which term was to cease on the performance of the trusts; subject thereto he devised it to his son in fee. In 1807 the son conveyed his estate to a creditor (*A. B.*), in trust, by sale or mortgage, to raise and pay the debt. In 1811 a suit was instituted to administer the testator's real and personal estate, but *A. B.* was not made a party until 1841. He took no steps to realise his security, and obtained no

1857.

The testator died in 1798.

*HUMBLE*  
v.  
*HUMBLE.*

*John Humble* being indebted to his bankers in the sum of 24,000*l.*, by indenture of *November*, 1807, conveyed his one-third of the real estates to them in fee, upon trust, by mortgage or sale, to raise that sum within three calendar months then next ensuing, with interest, and to pay themselves, and to raise further advances, and subject thereto to hold the third in trust for *John Humble*. *John Humble* thereby covenanted to pay, and declared that all terms in the premises should be in trust for the bankers, for better securing their debt.

In 1809, the Plaintiffs, who were legatees, filed their bill on behalf of themselves and all the other unsatisfied legatees, against the executors and *Bromley*, the trustee of the term of five thousand years, and thereby prayed that the will of the testator might be established and the trusts thereof performed, and for an account of the real and personal estate.

The Plaintiffs, at the time of the filing the bill, did not then know that *John Humble* had mortgaged his one-third share to the bankers, and they were consequently not made parties to the suit.

The usual decree was made in 1814 to take an account of the personal estate, &c. In 1830, by the decree on further directions, an account of the real estates was directed; and by an order in 1839 an inquiry was directed as to the incumbrances on the real estate.

In 1841, the fact of *John Humble* having mortgaged his one-third share having been discovered, a supplemental

mental bill was filed against the assignees of the bankers, who had then become bankrupts.

1857.

  
HUMBLE  
v.  
HUMBLE.

Neither the bankers nor their assignees, however, took any proceedings or steps in respect of the security, nothing was paid on account, and no acknowledgment had been made. The estate had been in the possession of the sons until a receiver of them had been appointed in another suit of *Brandling v. Humble*, to which the bankers and their assignees were not parties.

The real estates were sold in the cause, and the result of the accounts was, that after deducting 12,493*l.* (found due from *John Hunter* to the estate) from his one-third share of the produce of the real estate, there ultimately remained a sum of 2,105*l.* £3 per Cents., which represented his one-third share of the real estate.

There was also found due to the bankers, for principal and interest, a sum of 47,490*l.*

The assignees of *John Humble* (who had also become bankrupt in 1811) presented a petition for payment to them of the 2,105*l.* They stated "that no steps or proceedings whatever had ever been taken by the bankers previous to their said bankruptcy, nor by their said assignees since, to realize the mortgage security; and submitted that the assignees from lapse of time, and no proceedings being taken, and from other circumstances, were not entitled to any portion of the fund in Court arising from the share of *John Humble* in the real estates of the testator."

The assignees of the bankers, on the other hand, claimed the 2,105*l.* by virtue of the deeds of 1807.

Mr.

1857.  
  
 HUMBLE  
 v.  
 HUMBLE.

Mr. *Follett* and Mr. *M'Intyre*, in support of the petition, argued that the claim of the bankers and of their assignees was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 2, 24, 40, they having taken no proceeding to substantiate their claim from 1807, and no part of the principal or interest having been paid, or any acknowledgment in writing given. They argued also that the act applied to tenants in common; s. 12.

Mr. *Faber*, for the assignees of the bankers. The statute is no bar. The estate was reversionary and expectant on the cesser of the term of 5,000 years, and until the trusts of the term had been satisfied, the bankers could not proceed. Secondly: The bankers were not mortgagees, the deed of 1807 was not in the form of a mortgage, but of a trust for sale, and Sir *James Wigram* decided, that under such an instrument no foreclosure could be had; see *Sampson v. Paterson* (a) and *Jenkins v. Row* (b). Thirdly: The existing suit for administration, under which the Court took upon itself the control of the estate, prevented the operation of the statute. He cited *Burrell v. The Earl of Egremont* (c).

*The MASTER of the ROLLS.*

I think that this charge is barred by the statute. I do not see in what way I should be able to hold otherwise, unless I held that the statute does not apply to cases where the property mortgaged is of such a nature as to render it extremely difficult or disadvantageous to the mortgagee to realize it.

If

(a) 1 *Hare*, 533.

(b) 5 *De Gex & Sm.* 107.

(c) 7 *Beav.* 205.



If *John Humble* had simply been owner in fee, and had made the conveyance to his bankers in trust to sell and pay themselves, and hand over the surplus to *John*, and they had thought fit to take no steps in the matter for thirty-four years (for I hold that the time ceased running from 1841), if they had taken no steps from 1807 to 1841, the charge would have been gone, and the statute, the object of which was to prevent stale demands, would have barred the claim.

1857.

—  
HUMBLE  
v.  
HUMBLE.

What difference then exists in the circumstances of this case to induce the Court to hold that the statute does not apply?

First, it is said that there was a prior term of 5,000 years to pay debts and legacies. It is clear this does not affect the question, because the statute properly makes no distinction between a reversion and property in immediate possession. Besides there was no absolute term, so that *John's* estate did not arise until the end of 5,000 years, but it was a trust term to raise certain money in aid of the personal estate to pay debts and legacies, and then it was to cease. It was the duty of the trustees to raise the money as speedily as possible, for the purpose of administering the estate, and if that had been done, there would have been a prior charge of ascertained amount, one-third of which would have fallen on *John's* one-third share. The circumstance that it was an undivided third part does not affect the question. The statute equally applies.

That it was not prudent for them to take any proceedings, I can easily conceive, but that does not prevent the obligation imposed upon them of taking proper means to prevent the statute applying.

The

1857.

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HUMBLE  
v.  
HUMBLE.

The only other circumstance is, that a suit was instituted two years after the mortgage to administer the estate of the testator, to which the bankers were not made parties. If they had been, it would have been some excuse and might have prevented the statute being a bar; but the suit ought to have stimulated them to take some steps or proceedings, when they found other persons were about to administer and divide the estate as if all persons interested in it were before the Court and ignoring all claims of mortgagees.

In this state of circumstances, I am of opinion that I must treat the claim as if it had been abandoned, and order payment of the fund to the Petitioners.

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1857.



## STURGIS v. MORSE.

Nov. 5, 6, 7,  
16, 18.

**THOMAS GEORGE CONINGHAM** was, under the will of his grandfather, entitled, in reversion, expectant on the death of his father, to a share in some freehold and copyholds, but which he had mortgaged.

In 1825, *Thomas George Coningham* petitioned the Insolvent Debtors' Court for his discharge, and by an assignment executed by him, dated the 9th of *February*, 1825, all his estate and effects were vested in the provisional assignee, but no creditors' assignee was appointed until 1840. In *April* he was declared entitled to the benefit of the statute, and was discharged accordingly.

The insolvent prepared his schedule, and on the 18th of *April* he verified it on oath. In this he omitted all reference to his interest in the freehold and copyhold property. The following is an extract from the printed form of schedule, as filled up by the insolvent:—

“Freehold, copyhold, and leasehold estates, where situated, names of tenants, and annual rent thereof, and incumbrances (if any) thereon.—None.”

In 1825, *A. B.*, on his insolvency, omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853, his assignee filed his bill against the assignees under a subsequent bankruptcy and others for the recovery of the property. Held, that the claim was not barred by the Statute of Limitations, the case coming within the exception of the 26th section of the 3 & 4 *Will.* 4, c. 27, there having been “a concealed fraud.”

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*Property in Reversion or Expectancy.*

“Description of all the estates and effects, real and personal, &c. &c., in reversion, remainder, or expectancy,

VOL. XXIV.

N N

and

1857.

STURGIS  
v.  
MORSE.

and in which prisoner has any vested or contingent interest, according to his declaration hereinbefore made:—

|                                                                                                       | Supposed value,<br>if now to be sold. |  |  |
|-------------------------------------------------------------------------------------------------------|---------------------------------------|--|--|
| “ Freehold, copyhold, and leasehold estates, prisoner’s expectancy, and by whom now enjoyed . . . . . |                                       |  |  |
| “ None.                                                                                               |                                       |  |  |

“ I, *Thomas George Coningham*, do hereby swear, that the contents of my petition filed in this Honorable Court, and also of this my schedule, and of all and every part thereof respectively, are true. So help me God.

“ *Thomas George Coningham.*”

In consequence of this fraudulent omission, the assignee and creditors were ignorant of their rights and did not enforce them.

The father of the insolvent died in 1826, and the reversion fell into possession; *Thomas George Coningham* then entered into possession of the property, which, in 1829, he mortgaged to *Pigeon*.

In 1831, *Thomas George Coningham* was declared bankrupt. The Defendant *Morse*, who was appointed his assignee, afterwards obtained a conveyance of the legal estate from the heir at law of the surviving trustee of the will of the original testator.

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In 1840, and for the purpose of effecting a contemplated compromise between the parties, *Fell* was appointed creditors' assignee under the insolvency, and from the circumstances, which it is unnecessary to detail, the Court came to the conclusion, that from this time, (1840) *Fell* must be deemed to have notice of his rights under the insolvency.

1857.  
~  
STURGIS  
v.  
MORSE.

*Fell* died, and in 1850 the Plaintiff *Sturgis* was, by an order of the Insolvent Court, appointed new assignee of the estate and effects of the insolvent.

In 1853, *Sturgis* filed this bill against *Morse* (the assignee in bankruptcy) and other parties, praying a declaration that he was entitled to the share and interest of *Thomas George Coningham* in the freehold and copyhold hereditaments, and for a conveyance and consequential relief.

The principal question was, whether the Plaintiff's claim was or was not barred by the Statute of Limitations, it being contended, that the Plaintiff's rights were saved by the 26th section of the 3 & 4 *Will.* 4, c. 27, which is as follows :—

“And be it further enacted, that in every case of a concealed fraud. the right of any person to bring a suit in equity for the recovery of any land or rent, of which he or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered ; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of

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1857.

STURGIS  
v.  
MORSE.

such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed."

Mr. *R. Palmer* and Mr. *Osborne*, for the Plaintiff, cited *Dixon v. Gayfere* (a); *Sanders v. Deheew* (b).

Mr. *Lloyd* and Mr. *Martindale* for *Morse*. Mr. *Hardy*, Mr. *Selwyn*, Mr. *Stiffe*, Mr. *Follett*, Mr. *Toller*, Mr. *Terrell*, Mr. *Bagshawe*, and Mr. *Tudor*, for other Defendants, cited *Cholmondeley v. Clinton* (c); *Stansfield v. Hobson* (d); *Curtis v. Curtis* (e); *Doe d. Curzon v. Edmonds* (f); *Wyatt v. Barwell* (g); *Jolland v. Stainbridge* (h); 2 *Sud. Vend.* (i); *Petre v. Petre* (k); *Hawker v. Hallewell* (l).

The MASTER of the ROLLS said he would read over the evidence before hearing a reply.

*The MASTER of the ROLLS.*

Nov. 16. The principal and first important question is this:—whether the Statute of Limitations, on the facts of this case, constitutes a bar to the Plaintiff's demand. Upon this point, the short facts of the case are these:—*Thomas George Coningham*, who was entitled in reversion to a share in certain real estate, became insolvent on the

(a) 17 *Beav.* 421.

(b) 2 *Vernon*, 271.

(c) 4 *Bligh*. (O. S.) 1 and 2 *Jac. & W.* 1.

(d) 16 *Beav.* 236.

(e) *V. C. Wood*.

(f) 6 *Mee. & W.* 295.

(g) 19 *Ves.* 435.

(h) 3 *Ves.* 478.

(i) Page 223 (9th edit.)

(k) 1 *Drew.* 397.

(l) 2 *Sm. & G.* 498.

the 9th of *February*, 1825. Upon putting in his schedule in that insolvency, he was bound to state whether he was possessed of any property in reversion. On filling up the printed form for that purpose, he stated that he had "None."

1857.

STURGIS  
v.  
MORSE.

A good many questions are raised on the Statute of Frauds, but I am of opinion that this act of his, so far as he is concerned, brings the case within the twenty-sixth section of the Statute of Limitations (3 & 4 *Will.* 4, cap. 27).

It is clear that as the bill was filed in *January*, 1853, much more than twenty years had elapsed since the insolvency took place, and since the property, if at all, became vested in the insolvent assignee. The twenty-sixth section is in these words:—"And be it further enacted, that in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall or with reasonable diligence might have been first known or discovered."

I stop here to consider, in the first place, whether this is the case of a "concealed fraud," and I am of opinion that there being, at the time, nothing to point out to the assignee that he had any other property than that stated in the schedule, the fact of his deliberately stating in the schedule that which was false, viz.: that he had no reversion, was a "concealed fraud," and that by reason of such fraud, the assignee in insolvency was prevented from acquiring this property, or, in the words of the statute, was "deprived" of the property, because  
the

1857.

  
STURGIS  
v.  
MORSE.

the right to it vested in him under the assignment, but he was deprived of the possession of it by reason of the assertion of the insolvent, that he had no property of that description.

Then the next question is, when the time begins to run; the statute says that it is to be reckoned from the time, and not before the time, at which such fraud shall, "or with reasonable diligence, might have been first known or discovered." I thought it very important to look at the evidence which related to the communications with the insolvent assignee at the time when Mr. *Cunningham* became a bankrupt in 1831, but on looking through it as carefully as I could, I find nothing which, in my opinion, put him upon the knowledge, or shewed that, "with reasonable diligence," he might have ascertained this fraud which had been committed upon him. All that I find is this:—The assignee in insolvency was requested to concur in certain steps, for the purpose of the recovery of some property which the insolvent and bankrupt made claim to, but which is not the property in question, and which the parties did not succeed in recovering, and with regard to which the assignee in insolvency, in fact, declined to take any steps. It is said that this property was derived under the same will as that which gave the reversion of the property in question to the insolvent, and that if the assignee in insolvency had referred to the will, he would have seen that the insolvent had other property, as to which he ought to have inquired how it had been disposed of, or how it had become lost to the estate. In my opinion, it was not incumbent on the assignee in insolvency to examine the will and to trace up, in what way he might have had a claim to the property which he was requested to endeavour to recover, but which it appears was not recoverable.

The



The argument is, that if he had so traced it, and had examined the will, he might have seen something else which he might have followed up, which would have disclosed the fraud, and that this brings it within the meaning of these words of the statute:—"the time at which such fraud shall or with reasonable diligence might have been first known or discovered." But I do not concur in that view. The case is however altered in 1840. I think it cannot be disputed, that in that year, when Mr. *Fell* was appointed the assignee in insolvency, he was put upon inquiry, which, if made, would have led to ascertaining the real facts; and in truth I think he had notice, at that time, of the fraud that had been committed. He was made an assignee after long communication with Mr. *Druce*, his solicitor, for the purpose of ascertaining whether some steps should not be taken to make this property available, to some extent at least, for the creditors in the insolvency. But he was appointed in the month of *May*, 1840, and this bill was filed in 1853. It is therefore clear, that the statute has not barred the right, because twenty years from the period at which the right of action accrued under this statute had not elapsed at the time this bill was filed.

As to general laches, it is to be observed, that though Mr. *Sturgis* must undoubtedly be bound by the acts of any assignee in insolvency, which took place before he was appointed, yet with respect to him, personally, there is no imputation of laches at all; and, the statute having expressly said, that in such cases, the twenty years bar is to run from the discovery of the fraud, I am of opinion that the Plaintiff is entitled to the benefit of what the statute has so laid down, and that until the twenty years have elapsed, from the period when Mr. *Fell* was appointed assignee, he is not barred under this statute.

I think

1857.

STURGIS  
v.  
MORSE.

1857.

STURGIS  
&  
MORSE.

I think it unnecessary, therefore (having come to the opinion that under this clause the right of the Plaintiff to whatever passed under the assignment in insolvency is vested in him, and that he is entitled to enforce it), to consider the various other considerations and points which were urged on my attention, *e. g.*, whether there was an adverse possession or not, particularly from the time of the bankruptcy, in the assignee, on which, under the fortieth section, questions of some nicety arise.

But the grounds upon which I have founded my decision give rise to another question, which must be disposed of. The clause I have stated would bind Mr. *Coningham*, but it proceeds thus:—"Provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed." This necessarily raises the question of the validity of Mr. *Pigeon's* security, because that Mr. *Pigeon* was a purchaser for value to the extent of his mortgage, I have no doubt; and it is quite clear also that he did not assist in the commission of the fraud. The question is whether, at the time that he made the purchase, he did not know and had no reason to believe, that any such fraud had been committed. With respect to these words:—any "reason to believe," I treat them very much as I treat those in the former part of the section, that is to say, with reasonable diligence might have discovered, &c. But I am of opinion, on the facts of this case, that he had direct notice of the fraud, and I have come to that conclusion

clusion on the evidence before me on the facts which I am about to state.

1857.

STURGIS  
v.  
MORSE.

[*His Honor here went through the evidence, which it is unnecessary to detail.*]

I am therefore of opinion, that Mr. *Pigeon* is not entitled to priority over the insolvency in respect of his security.

NOTE.—The Defendant *Morse* appealed to the Lords Justices from this decision. They were of opinion, that the assignee in bankruptcy, having obtained the legal estate from the heir at law of the surviving trustee under the will of the original testator, and such assignee not taking it, in any sense, as a purchaser, the Statute of Limitations had no application, there being an express trust (s. 26); and on the 24th of *June*, 1858, they dismissed the appeal with costs.

SWINFEN v. SWINFEN.

Nov. 7, 9, 10.

**SAMUEL SWINFEN**, by his will, dated the 7th of *July*, 1854, devised his estate at *Swinfen*, and all his furniture and other moveable goods there, to his son's widow (Mrs. *Patience Swinfen*), her heirs, &c., and he appointed her executrix.

An attorney has not, by virtue of his office, an implied authority to compromise an action; but a client may become bound by a compromise entered into by his attorney without his authority, by not repudiating it within a reasonable time.

The testator died on the 26th of *July*, 1854.

The Plaintiff, Captain *Swinfen*, who was the heir at law, contested the validity of the will in this suit, and an issue was directed to try the validity of the will.

At the trial of an issue

The case came on for trial at *Stafford*, on *Saturday* the  
counsel agreed upon terms of compromise, and it was made a rule of the Court of Common Law. The compromise was unauthorized by the Plaintiff, and effected without the instructions of his attorney. There being no subsequent acquiescence, a bill by the Defendant in the action, for specific performance of the compromise, was dismissed.

1857.  
  
 SWINFEN  
 v.  
 SWINFEN.

the 15th of *March*, 1856, when Sir *F. Thesiger* appeared for Mrs. *Swinfen* and the *Attorney-General* (Sir *Alexander Cockburn*) for Captain *Swinfen*. Mr. *Simpson* acted as Mrs. *Swinfen's* attorney. The case was part heard on *Saturday* and stood over until *Monday*. On *Monday* morning terms of compromise were agreed upon between counsel. The terms were embodied in a written memorandum which was signed by the *Attorney-General* and Sir *F. Thesiger*, and was in the words following:—

“Terms of compromise. Juror to be withdrawn. Estates to be conveyed by Plaintiff at law to Defendant in fee, free of incumbrance, if any, created since death of *Samuel Swinfen*; such conveyance to date from *Michaelmas*, 1855. Defendant to secure to Plaintiff an annuity for her life, on the estate of 1,000*l.* a-year, inclusive of the 300*l.* a-year already secured to her on estate, also to date from *Michaelmas*, 1855. If any charge is existing on the estate created prior to the death of *Samuel Swinfen*, the interest to be borne in equal moieties. Plaintiff's costs as between attorney and client (not exceeding 1,250*l.*) to be paid by Defendant. Power to either party to make this agreement a rule of court. In event of any questions arising on the above terms, the same to be referred to Sir *F. Thesiger* and the *Attorney-General*. The house and grounds to be occupied by Plaintiff, without payment of rent, till *Michaelmas* next.”

A juror was thereupon withdrawn, and the memorandum of compromise was embodied in an order of *Nisi Prius*, which was afterwards made a rule of the Court of Common Pleas.

Mrs. *Swinfen*, insisting that the arrangement had been  
 made,

made, not only without her sanction but directly in opposition to her wishes, would not perform it. A rule *nisi* was thereupon obtained for an attachment against her, and on argument before three of the Judges of the Common Pleas, they were of opinion, that Mrs. *Swinfen* was bound by the consent of her counsel, but they thought that there was not sufficient evidence of a demand of performance and a refusal on the part of Mrs. *Swinfen* to justify an attachment (a).

1857.

SWINFEN  
v.  
SWINFEN.

Upon a subsequent application for an attachment, Mr. Justice *Crowder* differed from the rest of the Court, and the attachment was again refused (b).

Captain *Swinfen* then filed his supplemental bill, praying that Mrs. *Swinfen* might be decreed specifically to perform the agreement for a compromise, or, in the alternative, that another issue *devisavit vel non* might be directed.

There was evidence, to a considerable extent, entered into, which it is unnecessary to set out, the Court having come to the conclusion that Mrs. *Swinfen* had never authorized the compromise, and that her solicitor Mr. *Simpson*, had never instructed her counsel to consent to the arrangement which had been entered into.

However, the following was the substantial result of the evidence on both sides:—After the adjournment of the Court on *Saturday*, the 15th of *March*, Mrs. *Swinfen* was urged by her counsel to consent to a compromise, but she refused to accept any offer. She said “that she only wanted her own, and wished the case to be tried by a jury, and would abide by the verdict.”

She

(a) 18 *Com. B. Rep.* 485.

(b) 1 *Com. B. Rep. (N. S.)* 364.

1857.  
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SWINFEN  
v.  
SWINFEN.

She was, however, advised, and she consented to take a little time to consider, and agreed to send an answer the next day. She left *Stafford*, and about one o'clock the next day, Sir *F. Thesiger* received this telegraphic message from her: "The offer is refused." On the following morning (*Monday*), Mr. *Simpson* came to Sir *F. Thesiger's* lodgings, and told him that a circumstance had come to his knowledge, which made it extremely desirable that the case should be arranged; but he informed him that he had no authority to negotiate any compromise for his client, to which Sir *F. Thesiger* replied, that he would take all the responsibility on himself, jointly with his colleagues. Sir *F. Thesiger* then went and arranged the compromise with the *Attorney-General*, except as to costs. At the sitting of the Court, some conversation took place, and Sir *F. Thesiger* then urged Mr. *Simpson* to accept a modification of the terms which were offered. Mr. *Simpson* requested him to wait until Mrs. *Swinfen* (who was expected in *Stafford*) should arrive; but Sir *Frederic* pressed upon Mr. *Simpson* to agree before it was too late, and upon his hesitating, he (Sir *F. Thesiger*) said, 'that he must take it upon himself,' to which Mr. *Simpson* made no objection, but said 'that he (Sir *F. Thesiger*) must defend him against his client;' Sir *Frederic* immediately answered, 'that he was willing, with the counsel who were engaged with him, to take the responsibility on himself,' and he then signed the final terms of agreement between the parties.

Mrs. *Swinfen* arrived by the first train in *Stafford*, but after the compromise had been effected. She went to the Court house, and was so informed by Sir *F. Thesiger*; she left the Court and returned home. It did not appear that Mrs. *Swinfen*, at the time, repudiated the arrangement, but it was shewn that she  
stated,

stated, within a fortnight, that she did not recognize the act of her counsel, and did not intend to concur in the arrangement. By her affidavit, she distinctly swore, that she never gave instructions or authority to her attorney or to any other person to make any compromise; and she gave no other instructions to her attorney than to support the action and maintain its validity and integrity, and that she had not, since the compromise, done anything to ratify or confirm it, and had signified her disapproval of it, and her resolution to repudiate it.

1857.

SWINFEN  
v.  
SWINFEN.

The suit now came on, together with a motion for a receiver.

The Attorney-General (Sir *R. Bethell*), Mr. *R. Palmer*, and Mr. *Hobhouse*, for the Plaintiff. This is a binding contract, and if not, a receiver ought, at once, to be appointed over the estate.

All that was done at the trial was with the assent of the Defendant's attorney, who, being present, raised no objection, and neither informed the Court nor the opposite side that he dissented from the arrangement. It was his duty, if he dissented from the order, to have given immediate notice of his objection; *Furnival v. Bogle* (a). We rely on this: that counsel acted with the assent of the professional client, and therefore it is unnecessary to shew, that counsel has, by virtue of his office, a power to compromise the matter in litigation.

If it be said, that Mr. *Simpson* was not authorized by his client, the answer is, that it is immaterial, for an attorney has an implied authority to enter into a compromise

(a) 4 *Russ.* 146.

CASES IN CHANCERY.

1857.  
  
 SWINFEN  
 v.  
 SWINFEN.

compromise of the subject of litigation. The attorney of a party, Plaintiff or Defendant, is in reality the very Plaintiff or Defendant whom he represents ; he is for all the purposes of the action or suit put in the place of the client, and has equal powers over the subject of the litigation. He has complete authority to consent to any order dealing with the subject-matter of the suit, and which is binding on the party whom he represents in the contest. If an attorney were *bonâ fide* to consent to a verdict against him, it would, beyond all doubt, be binding on his client. Then why should not a consent to something less, and more beneficial to the client, be equally efficacious.

In *Filmer v. Delber* (a) a motion was made "to set aside an order of *Nisi Prius*, by which the cause had been referred to a barrister, on an affidavit by the Defendant, stating that she had expressly desired her attorney not to consent to any rule of reference." Sir *James Mansfield* said, "here is an express agreement to refer, properly entered into by counsel and attorney. It is now said, that they had no authority to enter into that agreement, if so, the Defendant's remedy is by action against her attorney. There would be no end to these applications if the Court were to interfere, such interference would lead to collusion ; when a party did not like the prospects of the reference, he would say, that he had never given his attorney authority to refer."

In *Mole v. Smith* (b) a doubt was suggested whether Mr. *Shadwell* was authorized to consent for Mrs. *Watson*, a widow, upon this Lord *Eldon* observed, "it is for Mr. *Shadwell* to consider whether he is authorized to give his

(a) 3 Taunt. 486.

(b) 1 Jac. & W. 673.



his consent for the widow. If he does, I must act upon it, *and she will be bound by it.*"

1857.

SWINFEN  
v.  
SWINFEN.

In *Furnival v. Bogle* (a) it is distinctly laid down by Lord *Lyndhurst*, that "a party is bound by the consent of his counsel given in Court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances."

In *re Hobler* (b), a petition to tax a solicitor's bill had been dismissed without costs, by consent of the Petitioner's counsel, the Petitioner undertaking to make no further application for a similar purpose. On a subsequent day, another counsel applied to rescind the order, on the ground that his client had not authorized his former counsel's consent to the dismissal. Lord *Langdale* said, "the business of the Court cannot proceed unless credit is given to the statements of counsel that they have authority for what they do. They must themselves judge of the extent of their authority under the ordinary responsibility. This petition must be dismissed with costs."

Regarding the case as one of principal and agent, then the law is this:—that an agent has, by implication, all the powers necessary for carrying his authority into effect and of performing his duties (c). If his powers are limited, he is bound to communicate the fact to the person with whom he is dealing, for otherwise

(a) 4 *Russ.* 142.(b) 8 *Beav.* 101.(c) *Paley* on "Principal and Agent," ch. 3, s. 5.

1857.  
  
 SWINFEN  
 v.  
 SWINFEN.

wise the principal will be bound, even if the agent exceed the limits of his restricted powers; *The Duke of Beaufort v. Neeld* (a).

According to the ordinary practice of the Court, orders are daily made upon the consent of parties by their counsel. If the authority of counsel or of the solicitors is to be verified, the ordinary business of the Court cannot proceed.

Next, if the agreement was not originally really binding, still Mrs. *Swinfen* subsequently adopted it; by not having, at once, repudiated the arrangement to the opposite party, she must be taken to have concurred in it; *Elworthy v. Bird* (b); *Furnival v. Bogle* (c).

The refusal of the Court of Common Pleas to issue an attachment against Mrs. *Swinfen* for contempt for the non-performance of the agreement is no objection to this Court directing a specific performance. In *Doe d. Williams v. Howell* (d), the Court of Exchequer would not grant an attachment against a party who had refused to comply with an award made by an arbitrator, under an order of *Nisi Prius*, yet Vice-Chancellor *Stuart*, in a cause of *Howell v. Williams*, afterwards decreed a specific performance of the award.

They also referred to *Thomas v. Hewes* (e); *Hargrave v. Hargrave* (f), and also to the cases where a solicitor had acted in a suit for a person without his authority, in which the Courts had held, that the proceedings were binding on the client, whose remedy was against his solicitor;

(a) 12 Cl. & Fin. 248.  
 (b) *Tomlyn*, 38.  
 (c) 4 Russ. 142.

(d) 5 Ex. Rep. 299.  
 (e) 2 Cr. & M. 519.  
 (f) 12 Beav. 408.

solicitor; *Wilson v. Wilson* (a); *Mole v. Smith* (b);  
*Bligh v. Tredgett* (c).

1857.

SWINFEN  
v.  
SWINFEN.

Mr. *Kennedy* and Mr. *H. W. Cole* for Mrs. *Swinfen*,  
the Defendant, were not called on.

*The MASTER of the ROLLS.*

I am of opinion, in this case, that there must be a  
new trial, and I am also of opinion, that the relief sought  
by the supplemental bill cannot, under the circum-  
stances of this case, be granted in this Court.

Nov. 10.

The case is rested, first, upon this question of prin-  
ciple:—whether an attorney or solicitor employed by a  
client is at liberty to compromise the subject-matter of  
the suit without the express authority of the client;  
and, secondly, the case is put upon the practice which  
the Court adopts in such cases. I do not understand  
how, upon the principles by which the relation of principal  
and agent is governed, the argument can be supported.  
An agent has full authority to do everything that is  
within the scope of his authority expressed or implied.  
What is the authority which is vested in an attorney  
in these cases? he is employed to conduct a suit for a  
client, but I apprehend it to be perfectly clear, that a  
compromise does not come within the term, “conduct  
of a suit,” and that a compromise is not within the  
meaning of the words “management of a cause.”  
Upon what principle, then, can it be said, that an  
attorney has an *implied* authority to compromise the  
subject-matter of a suit which he is employed to con-  
duct? How far does it reach? Does such implied  
authority

(a) 1 *Jac. & W.* 457.

(c) 5 *De Gex & Sm.* 74.

(b) 1 *Jac. & W.* 665.

1857.

SWINFEN  
v.  
SWINFEN.

authority extend so far as to enable him to sell the subject-matter of the suit? Yet, in point of fact, a compromise is nothing more than a sale between the parties, upon certain terms. Would it have been possible for Mr. *Simpson*, Mrs. *Swinfen's* attorney, to have sold his client's rights in the suit to a mere stranger for an annuity of 1,000*l.* a year? It is obvious that this would not lie within the scope of his authority if the purchaser were a stranger; then, can it be said that it is within the scope of his authority if sold to the Defendant in the suit? It appears to me that, upon ordinary first principles, it cannot be so treated. I should no more consider the attorney I employ to conduct a suit authorized to dispose of the property sought to be recovered or defended than I should expect that a person employed to take horses to a particular place to feed, or to break them in, would have an authority to sell or exchange them; or that a coachman, employed to drive a carriage, would have authority to exchange it. Unless there be some rule applicable to attorneys different from that which prevails in other cases of principal and agent, it appears to me to be impossible to say, that an attorney has, without the direct authority of his client, an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause, which is the matter that he is employed to do.

Next, am I bound by any authority to say, that this is not the law? *Elworthy v. Bird* (a) is an authority the other way. In that case, Sir *John Leach* entered into the question, whether counsel had sufficient authority or not, and, on the evidence, he came to the conclusion that authority had been given which bound the principal:

(a) 2 *Sim. & St.* 372, and *Tamlyn*, 38.

principal : but that implies that if such authority had not been given, the principal would not have been bound. The facts of that case were certainly very peculiar. The Defendant had been brought up before the magistrates at quarter sessions for an assault upon his wife ; they recommend a compromise ; they intimate in his presence that if he will consent to a compromise a nominal sentence will be passed upon him. Thereupon his solicitor, in his presence, does consent ; he is brought up, and the chairman, in passing sentence, said " I impose a nominal fine upon you because you have entered into the arrangement." To this the Defendant said nothing to repudiate the arrangement. Could there be a stronger case of tacit acquiescence, if treated as a civil proceeding ? undoubtedly it was a singular one, by reason of its being in a criminal proceeding, and one cannot very well see how the mitigation of the sentence could be made a term of the contract ; however, the magistrates, in point of fact, considered the mitigated sentence as the price of his acquiescence in the arrangement. Sir *John Leach*, under those circumstances, held that there was a distinct contract, by an acquiescence at the time, and that this Court was bound to enforce it against the Defendant. Upon the question of acquiescence, I go this length :—that if a client be present in Court, and stand by and see his solicitor enter into terms of an agreement, and makes no objection whatever to it, he is not at liberty afterwards to repudiate it.

1857.  
  
 SWINFEN  
 v.  
 SWINFEN.

In *Thomas v. Hewes* (a), the judges thought that there was a very great doubt whether, by any possibility, Lord *Falmouth* could be bound by the act of his attorney without his express authority on the subject. There

was

(a) 2 *Cromp. & M.* 519.

1857.  
SWINFEN  
v.  
SWINFEN.

was this peculiarity in that case, that the order or agreement had been acted upon by giving up possession of the land, and other steps had been taken in accordance with it. But the judges seem to have thought, that, except by express authority from the client, he could not be bound by a compromise entered into by his attorney, and that it would be a question for a jury to determine, whether the attorney had Lord *Falmouth's* authority to do what he did in his name.

The case of *Furnival v. Bogle* (a) was very peculiar, and I do not quite understand the ground upon which the Lord Chancellor puts it, when he says, that if material facts were not known to the solicitor at the time, the client would not be bound by the arrangement. But suppose the solicitor stood exactly in the same situation as the client; if the client himself had entered into a contract, he not being aware of certain facts, that would not be a reason for setting aside the contract he had entered into, if they had not been withheld from his knowledge by the other side.

It has been observed by Mr. *Palmer*, that the solicitor has certainly authority to bind the client to some extent, and that the question to be determined is, to what extent can he bind him. The first proposition is undoubtedly true; but the point before me is, whether the authority extends to this compromise which has been entered into. There may be cases in which questions of very considerable nicety may arise, as to whether a particular matter consented to is or is not properly one relating to the conduct and management of the cause. If it be, then I do not doubt that it is within the scope of the implied authority of the solicitor in the conduct

(a) 4 *Russ.* 142.

conduct and management of the cause, but if it be not, then I think that it is not within the scope of his authority.

1857.

SWINFEN  
v.  
SWINFEN.

It was pressed very strongly upon me, in argument, that unless this doctrine be supported, the business of the Court cannot proceed, and that it is a matter of the greatest possible importance to place implicit reliance upon the statements of counsel, that they are authorized to do particular acts. The expression used by Lord *Langdale* in the case of *Re Hobler* (a), which was very strongly insisted upon, is, "The business of the Court cannot proceed, unless credit be given to the statements of counsel that they have authority for what they do." That appears to be confirmatory, rather than contradictory, of the view I take of this case. There may be certain facts in that case which I do not know, but in that statement I fully concur. The question is undoubtedly one of very considerable importance, for this Court has frequently to deal with such matters. Orders are constantly made by the Court, upon the consent or non-opposition of the parties, and that not merely in the case of adults and of persons competent to consent, but also in the case of married women and infants, who have no power of consenting at all. It is material, for the determination of the question before me, to look at the manner in which the Court deals with all these cases. In the case of a married woman, this Court will not permit any one to say for her that she consents, when she has to dispose of property, or to waive her right to a settlement; it requires her consent to be given by herself personally, upon what is supposed to be a private examination by the judge, but which usually takes place in open Court. That is for the

(a) 8 *Beav.* 101.

1857.  
SWINFEN  
v.  
SWINFEN.

the purpose of shewing that no undue influence has been exercised on her mind. When the Court has to deal with the property of infants, it directs a reference, or has the facts before it established by evidence, in order to see that what is proposed to be assented to is for the benefit of the infant, and thereupon it binds the infant by the proceeding. But how does it act when all parties are perfectly competent to consent? Counsel states he consents, and the Court no more doubts his authority to make such statement, and that the consent has actually been given, than when he states that he appears as counsel for *A. B.* But if the doctrine which the *Attorney-General* pressed so strongly were to prevail, viz. that a client would be bound, whether he had consented or refused, it would be the incumbent duty of the Court, in every case, to ascertain that the facts had really been brought before the attention and had received the consent of the client before the order was made. The Court gives credit to counsel, and with great justice, for it knows that they act according to their instructions. It gives credit to the instructions given by the solicitors, knowing perfectly well, that solicitors act with the most perfect *bona fides*, and never give instructions which they do not consider they are duly authorized to give. Accordingly, it is for this reason, that this Court never inquires whether the client has given his consent or authorized the solicitor to give it, the Court assumes, upon the statement of counsel, that the solicitor has so instructed him, and that the solicitor has obtained the consent of his client to the arrangement. If that were not so, if the solicitor, without the authority of his client, could give a consent, depriving a party of a certain portion of his property, how could this Court act, with any confidence, without seeing that the solicitor had duly exercised his discretion in  
the



the case with regard to adults, as it does with regard to infants.

1857.

SWINFEN  
v.  
SWINFEN.

In the case of infants, the judge inquires, because he knows they cannot give their consent; but he does not do so in the case of persons who are competent to consent, because he assumes that they have been made acquainted with the facts, and that they have authorized the thing to be done. If the case were otherwise, what would be the consequence of the doctrine suggested by the *Attorney-General*. It would be this:—that every prudent man who employed a solicitor to conduct a case for him, would give this notice to the opposite side, “You are to understand, that my employment of a solicitor does not authorize him to compromise the suit without my express sanction and authority.” But after that, could the compromise be good? for a great portion of the argument has gone to this extent:—that the attorney had a species of authority of which the client could not deprive him, and that he would be bound by acts done under that authority, although done against his desire, and although that desire had been communicated to the other side.

I myself have no doubt whatever, both on principle and authority, that the employment of an attorney does not entitle him to sell the subject-matter of the suit either to a stranger or to the opposing party, without an authority for that purpose; and that so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself I should, in that case, be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence  
that

1857.

SWINFEN  
v.  
SWINFEN.

that the client himself had been communicated with on the subject.

Since I have been upon the Bench, I have always assumed that the client has been communicated with and that what is proposed is done with his sanction and knowledge. My opinion is, that unless this were so, the functions of this Court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say, that he has a right to dispose of the property of his client in a particular way, when, if he had communicated to him all the facts, the result would have been different, and yet that the other side are at liberty to say, that they are entitled to insist on such an agreement, and that the party is bound by it.


I am of opinion in this case, that *Mrs. Swinfen* cannot be bound by any implied authority in *Mr. Simpson* to enter into such a compromise. But the case goes beyond this, for I do not think, on the evidence, that *Mr. Simpson* did sanction the arrangement. It is undoubtedly true, that *Mr. Simpson* was the cause of the compromise and that no treaty would have been entered into on the *Monday* morning if he had not gone to *Sir Frederic Thesiger* and suggested to him the propriety of a compromise. I think it is but fair on the evidence to say, that but for that, no such treaty would have been entered into at all. According to *Mr. Simpson's* statement, the terms he suggested were quite different from those which *Sir Frederic Thesiger* agreed to, and the terms which *Sir Frederic Thesiger* agreed to were those which he says he knew from the lady herself she was not disposed to accept, because he had received a telegraphic message that "the offer was refused." It is clear, that nothing turns upon  
whether

whether it was considered as an "offer" from the other side or a "proposition" to be made to them; the substance of it was the same. Looking at Sir *Frederic Thesiger's* affidavit (and there cannot be the slightest doubt of its being accurate and true throughout) he states this fact also; he says, "I was pressing Mr. *Simpson* not to prevent a beneficial arrangement by standing out for 250*l.*, when a friend of the Defendant interfered and induced him to declare his determination not to settle at all," that is, shewing not only no consent, but a resistance to the arrangement on the part of Mr. *Simpson*. "After what I had heard from Mr. *Simpson* at my lodgings, I was most anxious that the trial should not proceed, and I pressed the *Attorney-General* with the observation, that it would not be right to allow his client to withdraw from what he had agreed to." Mr. *Simpson* states, in his affidavits, that he refused to have anything to do with the compromise and left the Court, that he stated that he would have nothing to do with it, that it must be made on Sir *Frederic Thesiger's* own authority, and that he must protect him from his client. It is true he sat still and did not address the Court on the subject. Then can it be said, after that, that this compromise was entered into with the authority of the solicitor? I think it is very difficult to say that such is the fair construction of the evidence before me. Mr. *Simpson* certainly had authorized something else to be entered into, but that particular compromise he does not appear to me to have authorized or sanctioned.

The next matter I have to consider is this:—Whether by any subsequent act Mrs. *Swinfen* has ratified the compromise. The facts are these:—She came to the Court a few minutes after the compromise, and after a juror had been withdrawn, and in the ante-room leading to


1857.

SWINFEN  
v.  
SWINFEN.

1857. to the Court she met Sir *Frederic Thesiger*, who told  
 her the compromise had been effected. Sir *Henry*  
 SWINFEN *Durrant* asked him by whose authority, and he said  
 v. "by yours," and he shortly after left the room.  
 SWINFEN.

Now it is said, that the proper course for Mrs. *Swinfen* to have adopted was, immediately to have gone into Court and required her solicitor to say, that she objected to the compromise, and to insist on the trial proceeding. Now I think there is no one but must feel that she was placed in circumstances of peculiar difficulty and embarrassment, one in which, even a person most conversant with the course of proceedings in courts of justice and of trials, if called on to advise her what course to take, would have found it extremely difficult to have determined what course it would have been most expedient for her to take. Assuming she had been ready at that moment to say "I will have nothing whatever to do with the compromise, I object to it, I repudiate it altogether," would any counsel most conversant with the courts of justice have recommended her at once to go into the Court, and by her solicitor or counsel insist on the trial proceeding. I doubt very much whether any gentleman of experience would have recommended that course to have been taken. It is not the mere experience of *Nisi Prius* practice, it is our daily experience how much the minds of persons are affected by little matters, how often a turn is given to the consideration of a case, by the disposition and feeling of the tribunal itself towards the parties themselves. No person who has filled any thing like a judicial situation but must have felt that he has constantly had to guard against such feelings arising in his own mind and has endeavoured to prevent them from having any weight. If she had asked her counsel, "Is that  
 a proper

a proper course to be taken," viz., to insist on the immediate proceeding of the trial, he would have said, "neither the judge nor the jurors will be very well pleased to hear that they are to be occupied three more days with the case, after expecting that the matter was settled and they were discharged from their functions; your counsel will not be in very good spirits, they have expressed an unfavourable opinion of your case and you are forcing them to go on." Would it be too much to say, "you will incur very great danger and run very great risk of success if you choose to go on in this state of circumstances." A prudent man probably would have said, "you had better take a little time to consider." In all this I am assuming that she could then have insisted on the continuance of the trial. All this, undoubtedly, appears to me a sufficient excuse for this lady's not going at the moment and saying to the Judge, "I insist on this trial proceeding now, though a juror has been withdrawn." But it does not exonerate her from the duty of expressing her opinion as speedily as possible. Whether she has done this I now proceed to inquire.

1857.  
  
 SWINFEN  
 v.  
 SWINFEN.

I observe that it was stated expressly, on the 28th of *March*, to Mr. *Wiley*, that she was dissatisfied. In the first place it was stated, that she was dissatisfied with the verdict at the railway station. It was stated to Mr. *Wiley*, that if she were pressed on the subject, she would repudiate the whole matter. Some communications seem to have been made by Mr. *Cole*, and on the 31st of *March* Captain *Swinfen's* solicitor writes to the solicitor of the Plaintiff to say, "We understand that she intends to repudiate the agreement; if we do not hear from you, we shall assume that that is so, and we shall take measures to enforce it."

That

1857.  
~  
SWINFEN  
v.  
SWINFEN.

That is exactly a fortnight after the trial. Now, certainly if the Plaintiff has not expressed her opinion as speedily as she ought, it has not produced the consequences of misleading the Defendant. It has not been denied, that there was an express intimation that she would repudiate the arrangement, and within a fortnight after the agreement had been entered into the solicitors of Captain *Swinfen* wrote, shewing their knowledge of this fact, and their intention to proceed speedily to enforce it.

No facts have been communicated to me to shew that any injury has been sustained by the Defendant by reason of the Plaintiff's delay or by her conduct generally, other than the general injury which has arisen from the arrangement going off, from which a great amount of litigation has arisen since, and probably if a great delay should take place before the trial there might be some loss of evidence; but at present, I am not aware that there is any loss of evidence, and, as I have already intimated, I do not know that she could, if she had so determined, have compelled the resumption and continuation of the trial when she first knew of the compromise. I do not think, upon these facts, that I can say, that the Plaintiff has, by any acquiescence, bound herself to carry this arrangement into effect. I disapprove of the terms in which she has put in her answer; the passage commented upon is open to the observations I have already made; but I do not think that I can say that the agreement ought to be specifically performed, or that I can make a decree against her on the ground of acquiescence.

Mr. *Hobhouse* says, that this arrangement would have stood if a verdict had been taken against the Plaintiff, and there had been an arrangement afterwards  
for

for granting an annuity. I do not concur in that observation; it appears to me that it would have been exactly the same question as that which is now before the Court, namely, whether a compromise was binding upon the client which had been entered into, without the due authority of the client, on the trial of an issue directed out of this Court to determine the validity of a will. If I am right in the view I take of it, this Court would, in the case suggested, have directed a new trial of the issue, for the purpose of ascertaining the point. Upon that part of the case I have come to the conclusion that it is impossible for me to say, this is an agreement which can be specifically enforced.

1857.  
SWINFEN  
v.  
SWINFEN.

Then Mr. *Palmer* presses very strongly, that if there is to be a new trial, it ought to be upon the terms of Mrs. *Swinfen* paying the costs. I am not disposed to do so; the case has been one, in my opinion, founded upon a mistake, and consequently I cannot direct any costs to be paid.

At the same time, though I am of opinion that the bill for a specific performance of this agreement must be dismissed, it must be without costs, for I shall treat it as one of the consequences of these unfortunate proceedings which have occurred.

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Upon appeal, the judgment was affirmed by the Lords Justices on the 22nd of *April*, 1858, on the ground (as I understood) that the agreement was entered into under  
such

1857.

SWINFEN  
v.  
SWINFEN.

such circumstances that this Court would not enforce it by a decree for specific performance. The issue was afterwards tried and the verdict was in favour of the will.

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NOTE.—Formerly attorneys were appointed in Court when actually present, but they were afterwards usually appointed out of Court, by warrant of attorney in writing; 1 *Tidd's Pr.* 93 (9th edit.); 1 *Bacon's Ab. Attorney* (C). There were several statutes requiring such warrant to be filed: 18 *Hen.* 6, s. 9; 32 *Hen.* 8, c. 30, ss. 2, 3; 18 *Elis.* c. 14, s. 3; 4 & 5 *Anne*, c. 16, s. 3, repealed by the 6 & 7 *Vict.* c. 73.

If this practice had been observed, the terms of the warrant would have defined the limits of the attorney's authority, but the practice degenerated into one of mere form; and although a supposed warrant of attorney was filed, on which there was a stamp duty of five shillings, none was ever executed by the client. When entered on the record it was in the simple form of *A. B.* puts in his place *C. D.*, his attorney. See *Archbold's Forms* (2nd edit.), pp. 95, 96. In equity, also, a "warrant to prosecute" and a "warrant to defend" were filed by the solicitors, for which a fee was allowed by the General Orders of 1807. See 1 *Turn. & V.* (6th ed.), pp. 3, 475, and 2 *Sand. Ord.* 686. But now a mere verbal authority is sufficient to commence or defend an action or suit, though it is advisable to obtain a written retainer; 1 *Chitty's Archbold* (10 edit.) 71; *How v. Phillips*, 6 *Beav.* 176. The usual form of retainer is, "for the recovery of my claim," or, "of a debt," &c.; or, on the part of a Defendant, "to defend the above action;" 2 *Chitty's Forms*, 20.

I have been unable to discover the usual forms of warrants of attorney to sue or defend as anciently given; they do not appear upon the old records which I have examined. Possibly they resembled the warrants of attorney to confess judgments, the forms of which will be found in *Tidd's Forms*, chap. xxi., and 2 *Bythewood*, 343. These, for the protection of the Defendant, the legislature has declared to be of no force, unless there shall be present some attorney on behalf of the person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant. 1 & 2 *Vict.* c. 110, s. 9; and see 3 *Chitty's Statutes* (2nd edit.), 1529.

It would be extremely difficult to infer, that the ancient warrants of attorney to sue or defend, or the modern forms of written retainers, ever authorized, in terms, the compromise of the rights of the parties. It would be equally difficult to conclude that a written authority, expressly limited to sue or defend a particular action, would authorize the attorney to negotiate and conclude a compromise without the further authority from his client.—C. B.

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1857.

The SOMERSET COAL CANAL COMPANY  
v. HARCOURT.

Nov. 13, 14,  
16, 23, 25.

THE Plaintiffs were incorporated by an Act of Parliament in 1794 (a), which authorized them to make and maintain a canal, with certain railways from several collieries in the county of *Somerset*, to communicate with the *Kennet* and *Avon* Canal, in *Wiltshire*. They were authorized to take compulsorily the lands necessary for that purpose, and the guardians of infants were empowered to sell and convey, either for a gross sum or an annual rent, to be secured as therein mentioned. Commissioners were appointed to determine the amount of consideration to be paid for the purchase; or, in case persons refused to submit to their decision, or "through disability by nonage" should be prevented treating, the amount was to be settled by a jury. Upon payment or tender of the purchase-money so ascertained, the lands were to vest in the company.

A canal company had, under their act, compulsory powers of taking land. In 1797 they took the lands of Lord W., an infant, and the value was assessed by the commissioners at a fixed rent of 14*l.* a year. The proceedings, however, were informal and not binding on the parties. The infant attained twenty-one in 1806, and from that time a rent had been paid by the company, varying from and not founded on that mentioned in the award. The representatives of A. B. had recently threatened to eject the company. The

Part of the lands required for the undertaking belonged to *John James* Earl of *Waldegrave*, then an infant. At a meeting of the Commissioners in 1797, which was attended by *John Bellingsley*, the steward of the estate, they fixed the sum of 349*l.* 7*s.* 10*d.*, or an annual rent of 14*l.*, as the amount of the purchase-

money

(a) 34 *Geo.* 3, c. 86.

Court held, that though the company was not entitled to a conveyance on the ground of the adoption and long acquiescence in the award, still, whether the compulsory powers had expired or not, the company were entitled to take the lands upon payment of a proper compensation, in accordance with the decision in *The Duke of Beaufort v. Patrick* (b).

(b) 17 *Beav.* 60.

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

money to be paid for the lands required. This sum of 309*l.* 7*s.* 10*d.* was, in the same year, paid to *Billingsley*, on his undertaking either to procure a conveyance or return the money.

The guardians of the Earl did not take any part in the arrangement, and it was not pretended that this award was originally valid, the necessary formalities required by the act not having been complied with. The company, however, took possession of the land, and formed their canal. The Earl attained twenty-one in 1806, and, in 1808, *Billingsley* returned the 349*l.* 7*s.* 10*d.* to the company. From that time to the present the company had paid an annual rental, nearly corresponding with the 14*l.* per annum awarded to the Earl and his successors in the estate.

Disputes arose, in 1846, between the Plaintiffs and Defendants, (the successors in the estate of the Earl of *Waldegrave*,) as to the form of receipt to be given, and ultimately, in 1854, the Defendants, (treating the company as mere tenants from year to year of the lands taken,) gave them notice to quit and threatened to eject them.

The Plaintiffs then filed this bill, alleging that, in 1808, it had been agreed that, instead of paying a gross sum for the purchase of the lands, they should pay the annual rent settled and fixed by the award; that they had accordingly paid the 14*l.* a year from that time until the dispute arose, and had held the land under the powers of the Act.

The Defendants insisted that they were entitled to the fee simple of the lands, and that the Plaintiffs were only yearly tenants, whereas the Plaintiffs “ submitted  
 and

and insisted, that they were absolutely entitled to the fee of the whole of the lands mentioned in the award, and that they became purchasers of the fee simple thereof in consideration of the perpetual yearly rent of 14*l.*, directed to be paid by the award, and paid in pursuance of the same, and that they were now entitled to a conveyance of the fee simple of the same, if necessary, from the Defendants."

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

The bill prayed, 1st, a conveyance of the lands from the Defendants; 2ndly, an injunction to restrain the Defendants proceeding in erecting a bridge over the Plaintiffs' railroad, into which the canal had been converted; and, 3rdly, an injunction to restrain the ejection.

Mr. *R. Palmer*, Mr. *Osborne* and Mr. *W. D. Lewis*, for the Plaintiffs, argued, that the award, if not legally valid, had ever since been acted on and acquiesced in by the receipt of the rent of 14*l.*, thereby awarded.

That even if that were not so, the Court would grant relief, on the principle acted upon in the case of *The Duke of Beaufort v. Patrick* (a). They also relied on *The Duke of Devonshire v. Eglin* (b), and *Powell v. Thomas* (c).

Mr. *Selwyn* and Mr. *Fischer*, *contrà*, argued that the award was invalid and had never been acted on, the evidence establishing that the annual rent paid was not the 14*l.*, but one varying from time to time. That there was no contract and no rights except under the act;

(a) 17 *Beav.* 60.

(b) 14 *Beav.* 530.

(c) 6 *Hare*, 30<sup>u</sup>

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

act; and that the expenditure by the Plaintiffs, with full knowledge of the circumstances of their defective title, created no equity against the Defendants.

They cited *The Duke of Leeds v. The Earl of Amherst* (a); *Collen v. Gardner* (b); *De Montmorency v. Devereux* (c); *Dann v. Spurrier* (d); *Pilling v. Armetage* (e).

*The MASTER of the ROLLS.*

Nov. 23. The object of this suit is twofold. The first part of it prays that the Defendants may be decreed to execute a proper conveyance to the Plaintiffs of certain lands taken by the Plaintiffs for the purpose of their canal, under an Act of Parliament passed in the thirty-fourth year of the reign of *Geo. 3*; and the other part seeks to restrain the Defendants from erecting certain bridges over the canal, or what is now a railway, they not having complied with the exigencies of the act in that respect. These matters are in my opinion quite distinct, and I shall treat them as distinct in the observations which I am about to make.

The first point was that which was most discussed, and relating to which there is the greatest quantity of evidence. The case of the Plaintiffs is this:—Not that there was any regular conveyance or any contract made, but that sixty years ago the commissioners appointed under the Act of Parliament made an award fixing the value of this property, and that although this award was not originally binding on the Earl of *Waldegrave*, the owner of the property, yet that it has been acted upon from that

(a) 2 *Phillips*, 123.  
 (b) 21 *Beav.* 540.  
 (c) 7 *Cl. & Fin.* 188.

(d) 7 *Ves.* 231.  
 (e) 12 *Ves.* 78.

that time to the present, and that it has been especially acted upon and confirmed by an arrangement entered into in the month of *May*, 1826; that in this state of circumstances, considering the length of the time that has elapsed, it is binding on the Earl, and on all persons claiming under him, and that it cannot now be disturbed.

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

On the other side, it is contended, that, in fact, the Earl not only never entered into or authorized any arrangement whatsoever, but that instead of requiring the *Somersetshire* Coal Canal Company to take the land and to pay any price for it, he, in fact, allowed them to hold it at a rent, which was fixed, from time to time, wholly independent of any valuation, or any authority contained in the award made by the commissioners under the Act of Parliament.

I am of opinion, that a conveyance and a regular agreement for the sale of the land is not necessary, and that if I found a mutual understanding acted upon, although not expressed in writing, for sixty years, between the company and the owner of the land, I should not disturb such an arrangement; but, in the absence of any positive evidence to the contrary, I should assume everything that was necessary to give it validity, which the time would permit for that purpose: but then the evidence of the actual understanding, and of the acting upon it, must be clear and distinct.

This is a question of fact, and I proceed to examine the evidence on which the matter stands, and to state the conclusion to which it has led me on the subject.

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

In the year 1794, the act passed which enabled the company to form their canal and to take land, either by paying a fixed sum for it or by paying a rent. In 1797, the commissioners under the act met and fixed the value of the Earl's property to be taken by the company at a sum of 349*l.* 7*s.* 10*d.*, or a rent of 14*l.* a year. The company thereupon took the land; they seemed to have settled with the lessees of the land independently, and to have retained it (with the exception of a certain portion which has been returned) from that time to the present. The Earl was an infant at that time; it was possible to bind him under the Act of Parliament, but the necessary formalities to do so were not pursued by the commissioners, and it is an admitted fact, upon the state of the evidence before me, or a fact which cannot be disputed, that this award, at the time it was made, was not legally binding on him. But in the view which I am now taking of this case, I am not of opinion that this is a matter of very great moment.

The purchase-money of 349*l.* was paid to a person of the name of *John Billingsly*, who, although he appears to have been to some extent connected with the canal company (*a*), acted as the Earl's agent in the whole of this matter. However, the inference to be derived from this payment is removed, because, in the year 1808, this money was repaid by *John Billingsly* to the company, together with interest on it to that time, and therefore up to that time, the valuation of the commissioners was not acted on. The Earl attained his age of twenty-one years in 1806, and at that time the first document which I refer to was prepared. It is made by *John Billingsly*, and is entitled "*John Billingsly's Account*"

(*a*) He was a proprietor named in the Act.

Account of Lands to be paid for on the Coal Canal, taken 12th of *July*, 1806." In this it specifies Lord *Waldegrave* as a creditor for 349*l.*, besides interest: that merely shews, therefore, that the lands were to be paid for, and were not at that time actually paid for. Then I find a survey that was taken in the year 1807, which is an exhibit entitled "Survey of Lands in the Parish of *Radstock*, occupied by the Proprietors of the *Somersetshire* Coal Canal Company, belonging to the Right Honorable *John James* Earl *Waldegrave*." Now up to this time, not only is there nothing settled and nothing paid, which I should require proof of, but I have evidence, which I am coming to presently, which convinces me of the opposite and proves that nothing was paid.—[*His Honor* here examined and considered the written documents down to 1823, and came to this conclusion upon them:—During the whole of this period, there is nothing whatever shewing the slightest trace of the 14*l.* per annum having been paid as the purchase-money for the lands in reversion and the lands belonging to the Earl.

Then commences the transaction upon which the Plaintiffs principally rely.—[*His Honor* here referred to a letter from *Mr. Langford*, the clerk of the company, to *Captain Waldegrave*, of the 24th of *March*, 1823, in which, in making a proposal, he stated—"the commissioners fixed the rent of all the land taken at 14*l.* per annum."]

Now that is true; the commissioners did fix the amount of the rent of all the land of the Earl to be taken for the railway company, whether reversionary or not, at 14*l.* per annum. But what is not correct is this: the supposition that that fixing of the rent had,

1857.

The  
SOMERSET  
COAL CANAL  
COMPANY  
v.  
HARCOURT.

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

had, in point of fact, been the basis of the rent paid by the company to the Earl from that period. The answer given to that by Captain *Waldegrave* is to this effect.—[*His Honor stated the part relating to the proposal, and continued:*]—The former part of the letter does not assist at all. Captain *Waldegrave* does not dispute the propriety of Mr. *Langford's* observation, that the rent was fixed by the commissioners at 14*l.*; but if I am right in the view which I have taken of this case hitherto, Mr. *Langford* was under an error when he wrote it, and Captain *Waldegrave* in his answer does not at all dispute or say anything in answer to that, but he makes the proposal which I have stated, which is clearly nothing more than a proposal for the purpose of having the lands sold and the fences put up. In answer to that, Mr. *Langford* says, “the company will readily close with the terms you propose, namely, the canal company to give up to the Earl of *Waldegrave* the 4 acres and 17 perches of land enumerated in our former statement, and to pay the Earl of *Waldegrave* for fencing off all such parts of the lands as may require it, and the company to have their rent of 14*l.* reduced, in proportion to the lands so given up, which deduction we believe is 8*l.* 10*s.* 6*d.*, so that the future annual rent to be paid by the company to his Lordship will be 5*l.* 9*s.* 6*d.*”

Now, undoubtedly, that letter proceeds upon the faith and belief that they were proceeding upon the rent of 14*l.*, as fixed by the commissioners; but I have already stated, that I am convinced by the evidence that this is an error, that the 14*l.* as settled by the commissioners was not the rent paid, but that the amount which was paid was the 13*l.* 16*s.* 10*d.*, not for the land settled by the commissioners, but for the land in possession, including



cluding the railroad lands, which was a totally different matter.

Then the first question is, whether, in that state of circumstances, it is possible to treat this, which is nothing more than an error between Captain *Waldegrave* and Mr. *Langford*, as an acknowledgment or agreement that the 14*l.* fixed by the commissioners should be treated as the sum to be paid for the purchase of the reversionary lands of the Earl, together with the lands taken in possession, not including the two acres of railway lands, which were separate and distinct? I am of opinion that it would be impossible so to treat it; there is not in the letters the slightest trace of an intention to alter any existing arrangement, except as to certain lands to be given up by the company to the Earl, certain fences, and the deduction to be made from the rent; and both parties assume that 14*l.* was the amount of rent paid, although it was, in point of fact, 13*l.* 16*s.* 10*d.* fixed for other lands, and some of the lands included in the commissioners' valuation, and excluding various portions of the reversionary lands which the commissioners themselves had included. It is impossible, therefore, that this can be treated as a binding arrangement between the parties. Then what takes place afterwards is this:—[*His Honor referred to the subsequent documents and correspondence, which it is unnecessary to state, and came to a letter written on the 17th of January, 1826, by Mr. Langford, arranging a meeting between the parties, and continued:*]—It appears, that with it there was a document containing a settlement of the rent accounts between Lord *Waldegrave's* trustees and the *Somersetshire* Coal Canal Company, which was prepared with explanatory notes in red ink, and which is singular in various respects as shewing the  
extreme

1857.

The  
SOMERSET  
COAL CANAL  
COMPANY  
v.  
HARCOURT.

1857.  
  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARBOUR.

extreme inaccuracy of the person who prepared it, he probably not having the original documents, as the footing of the adjustment which was then made. It begins by stating, "The perpetual annual rent to be paid to the trustees by the canal company, as settled by the commissioners in 1797, 14*l*." Then he puts this marginal note in red ink :—"The original adjustment of the commissioners specifies twelve pieces of land, estimated at 14*l*. 7*s*. 1*d*." (referring to the last document which I have mentioned, but not referring to the real award of the commissioners, and not understanding how the difference arose).

Then comes the document of the 2nd *May*, 1826, which is much relied on by the Plaintiffs, for the purpose of establishing their case. It professes to be "The settlement of the Rent Account between Lord *Waldegrave's* Trustees and the *Somersetshire* Coal Canal Company, up to *Lady-day*, 1826, from *Lady-day*, 1824," when the last payment was made. It says, "The perpetual annual rent to be paid to the trustees by the company, as settled by the commissioners in 1797, 14*l*." That is the only important item in the whole paper, the rest of it merely specified what additions are to be made to, and what deductions are to be made from it, and it is signed by Mr. *Hill* for the company, and by Mr. *Tucker* for the trustees.

Now, the first thing to be considered upon this document is, what is its nature and character, and what degree of value is to be given to it? In the first place, it was not an independent agreement for the sale and purchase of lands; if it had been, it ought to be shewn that Mr. *Tucker* had an authority to enter into such an agreement: nay, more, it would be necessary to go still further

further ; as he professes to act as the agent for Lord *Waldegrave's* trustees and to sign it for the trustees of the Earl, it would be necessary to shew that the trustees had power to sell or purchase the land. Nothing of that sort was done. But what is of greater importance is, that it does not profess to be anything of the sort ; it professes to be nothing more than a settlement of the rent due to the Earl from the company, having regard to the rent already paid and to the deductions to be made from it. There was this error in that document ; they put the rent already paid as 14*l.* per annum, whereas the rent already paid was 13*l.* 16*s.* 10*d.* ; again, they put the rent at 14*l.*, as a perpetual rent fixed by the commissioners, whereas, upon going through the details of the documents, it is established to my mind, beyond the possibility of question or doubt, that the 13*l.* 16*s.* 10*d.* was paid for other and different lands, only some of which were included in the commissioners' award ; consequently this, which was a mere error, cannot of itself be considered as establishing anything which took place at that time as a distinct and specific arrangement.

Now, having established the mistake, the question then necessarily is this :—Does the common mistake of Mr. *Langford* and Captain *Waldegrave*, in 1823, followed by the mistake of Mr. *Hill* and Mr. *Tucker*, in 1826, bind the property itself and give sanction or life to a supposed arrangement, which, in point of fact, never had existence ? Can it give efficacy to an invalid award, or create a contract where there was none previously existing ? I am of opinion that all these questions must be answered in the negative, and that the word “perpetual” there is utterly without meaning, and cannot bind any parties on the subject, and that it ought

1857.

The  
SOMERSET  
COAL CANAL  
COMPANY  
v.  
HARCOURT.

1857.

  
 The  
 SOMERSET  
 COAL CANAL  
 COMPANY  
 v.  
 HARCOURT.

ought to have been written, "a rent of 13*l.* 16*s.* 10*d.*," instead of "a perpetual rent of 14*l.*"

I am of opinion, therefore, that this bill entirely fails in this respect, and that so far as it prays the relief sought in the first paragraph of the bill, it must be dismissed; and if the Defendants require it, it must be dismissed with costs.

Then upon the rest of the case, my opinion is this:— That the Defendants are not at liberty to evict the Plaintiffs from the lands held by them under the Earl of *Waldegrave*, but that they must be treated as lands taken for the use of the canal company, and that the company are entitled now to hold them (if they desire so to do) on the principle on which I acted in the case of the Duke of *Beaufort* against *Patrick* (a).

So treating them, I am of opinion that the 51st section of the 34 *Geo.* 3, c. lxxxvi, applies, and that though the owners and occupiers of the adjoining lands are at liberty, at their own expense, to erect bridges, yet they must first adopt one of the two courses prescribed by the act; they must either apply to the commissioners under the Act of Parliament, in the manner there mentioned, or they must apply for and obtain the consent and approbation of the committee of proprietors. Unless they do one of these two things, they are not at liberty, as I read the Act of Parliament, to erect the bridge they require, unless the commissioners and the committee of proprietors should resist, from motives of obtaining some undue advantage, or from some unreasonable cause, in which case this Court, if it had cognizance of the whole matter, would probably do

(a) 17 *Beav.* 60.

do so, or if not a Court of Law would afford the Defendants redress, and give them power to erect the bridges. The Defendants have not taken this step, and in this respect I think their case is defective.

1857.

The  
SOMERSET  
COAL CANAL  
COMPANY  
v.  
HARCOURT.

On the other hand, the canal company have not taken the steps to complete their title, and become the owners of the land by paying the proper price for it, in which respect their case appears to me to be defective. Now I shall endeavour to remedy these defects, and to do justice between the parties, by making an order to the following effect:—In the first place, it appears to me that there is nothing to prevent the Plaintiffs from putting in force the compulsory powers of the Act of Parliament, for the purpose of ascertaining the value of this land. It is at the option of the company to do so or not; if they state to me that they elect not to do so, and not to pay the price of this land, then I shall simply dismiss the bill; but if they express to me their intention to take the proper steps for ascertaining the price to be paid for the land, then I will, on their undertaking to do so within a reasonable time, grant an injunction against the Defendants, restraining the erection of the bridge until further order of the Court. Not a perpetual injunction, because the Defendants may, by pursuing the proper means which I have referred to, and which are specified in the 51st section of the Act of Parliament, obtain leave to do so, and the injunction would then be dissolved, and I must, for this reason, reserve liberty to apply. I understood, in the course of the argument, that the bridges were already erected, and that they were erected upon an undertaking given by the Defendants that they would pull them down, in case this Court, or the Court of Appeal, should think proper to grant a perpetual injunction against the erection of the bridges.

My

1857.  
The  
SOMERSET  
COAL CANAL  
COMPANY  
v.  
HARCOURT.

My decree will be simply to dismiss the bill, so far as it prays the relief sought in the first paragraph, and with respect to the rest, upon the Plaintiffs undertaking to take the proper steps to ascertain the value of the land, to continue the undertaking of the Defendants, which I do compulsorily, until further order of this Court, with liberty to apply.

Mr. *Palmer*.—The company will unquestionably exercise their powers, if indeed they continue to exist.

*The MASTER of the ROLLS*.—In case the compulsory powers have expired, as to which I do not mean to express any opinion, I should consider myself entitled to do what I did in the case of the Duke of *Beaufort v. Patrick*, and myself settle the amount to be paid.

Mr. *Selwyn*.—So far as the bill seeks relief in the first paragraph, it is to be dismissed with costs.

Mr. *Palmer*.—Then I should ask for the costs of the other part.

*The MASTER of the ROLLS*.—No, I cannot do that. I think I should give no costs as to that part; the litigation would never have arisen if the canal company had taken the proper steps for ascertaining the value of the land.

Mr. *Palmer* then asked that the Defendants might be restrained using the bridge, but

*The MASTER of the ROLLS* refused to extend the injunction to that extent, upon the Defendants undertaking

taking to keep an account, and abide by any order with respect to restoring the works, and as to damages occasioned to the Plaintiffs by the use of the bridges.

1857.

The  
SOMERSET  
COAL CANAL  
COMPANY  
v.  
HARCOURT.

NOTE.—The case was affirmed, upon appeal, by Lord *Chelmsford*, L. C., on the 9th of *June*, 1858, who held that the compulsory powers had not expired.

MOCATTA v. BELL.

Nov. 21.

THE Defendant *Bell* was the owner of a considerable quantity of Spanish Deferred £3 per Cents. They were in the form of bonds, payable to bearer and negotiable, the title thereto passing by mere delivery.

The Defendant employed a stock broker to obtain a loan on the security of bonds, which were transferable by delivery. The broker, accordingly, borrowed a sum from the Plaintiff, but he wrongfully applied a part to his own use. The broker was unable to redeem the bonds, and the Defendant, with knowledge of the circumstances, promised and agreed to call and give the broker his cheque for the deficiency on

In *November*, 1855, *Bell* placed these bonds in the hands of his stock broker, Mr. *Backhouse*, with instructions to borrow 11,000*l.* on them. *Backhouse* accordingly borrowed 6,000*l.* of the Plaintiff, a stock broker, without disclosing his principal's name.

On the 20th of *August*, 1856, *Bell* instructed *Backhouse* to redeem these securities, and he furnished him with 6,317*l.* for that purpose; but *Backhouse*, who had raised an additional 2,000*l.* for himself on *Bell's* securities, which he had applied to his own use, was unable to redeem the whole; and on the next settling day (29th *August*) he redeemed 4,000*l.* only, and arranged with *Mocatta* to continue the loan of the remaining 2,000*l.*,

until receiving back the bonds. The broker, acting on the faith of this promise, gave a crossed cheque to the Plaintiff, and redeemed the bonds. On the same day the Defendant, by a trick, obtained possession of the bonds without giving his cheque; and the broker's crossed cheque was consequently returned, and he became a defaulter. Held, that the Defendant was responsible to the Plaintiff for the fraud, and that the bonds in his hands were still liable to repay the Plaintiff his debt.

1857.  
~  
MOCATTA  
v.  
BELL.

until the next settling day, on the security of the Spanish bonds for 10,710*l.*, then remaining in his possession.

On the 1st of *September Bell* had notice that his bonds had been "lent," but not, as he said, that they had been "pledged," and he had then notice of the continuance of the security for 2,000*l.*, but not that they were held by the Plaintiff.

The next settling day was on the 16th of *September*, 1856, when *Backhouse* had arranged with *Mocatta* to continue the loan. *Bell*, however, being informed, that *Backhouse* could not redeem the bonds for want of money, came to *Backhouse's* office and saw him, and was much shocked and surprised. Explanations then took place, from which it appeared, that *Backhouse* was deficient by about 1,500*l.* of the sum requisite to enable him both to meet his engagements falling due on that day, and to redeem the bonds by payment of the 2,000*l.* *Backhouse's* clerk (*William Wilkinson*) then observed, that the bonds were worth much more than 2,000*l.*, and that with assistance to the extent of 1,500*l.* it would be in the power of *Backhouse* to redeem them at once. This suggestion was approved of by the Defendant *Bell*, who was then aware that *Mocatta* had advanced the 2,000*l.* on the bonds through the medium of *Backhouse*, and that they remained pledged with him as a security for the 2,000*l.* and interest.

Upon further examination at such interview, it appeared that 1,950*l.*, with the addition of a balance of about 280*l.* which *Backhouse* had at his bankers, would enable him to meet his engagements and redeem the bonds; and that, besides such balance at his bankers, his available resources consisted of 1,020*l.* Spanish bonds.



bonds. Thereupon, with the object or ostensible object of effectuating the immediate redemption of the bonds in pledge, *Bell* promised *Backhouse* to assist him with the 1,500*l.* required, and he desired *Backhouse* to rescind, if possible, the arrangement for continuing the loan. It was then further arranged, that *Bell* should purchase the 1,020*l.* Spanish bonds from *Backhouse* for 450*l.* *Bell* then asked, when *Backhouse* could procure possession of his bonds, to which *Wilkinson* replied, "half-past two o'clock, or sooner, if you wish." It was finally agreed, that *Bell* should advance 1,950*l.*, viz., 1,500*l.* by way of loan, and 450*l.* as the purchase-money for the 1,020*l.* Spanish bonds; and he distinctly stated, that he would call at "half-past two o'clock" and give *Backhouse* his cheque for 1,950*l.* upon receiving back his bonds. *Bell* took away 510*l.* Spanish stock, part of the 1,020*l.* stock agreed to be purchased from *Backhouse*.

It appeared from the evidence of *Bell* the younger, that at the interview, he fancied he saw the bonds in *Backhouse's* safe (such really not being the fact), and that when he got outside the office, he told his father, who became very angry, and said it was a gross attempt to defraud him, "and that it should not succeed." He said, his father had really intended to advance the money, "and that it was solely in consequence of his, the son's information, respecting the bonds being in *Backhouse's* possession (which was not the fact) that he changed his determination, "and he desired his son to take a blank cheque in his hand and call at *Backhouse's* office at the hour appointed, and if he found his surmises correct, he was, if possible, to get possession of the bonds, without giving the cheque."

After this interview, *Backhouse*, about two o'clock,  
went

1857.

~~~~~  
MOCATTA  
v.  
BELL.

1857.  
MOCATTA  
v.  
BELL.

went to *Mocatta*, and obtained his consent to rescind the bargain for continuing the loan of 2,000*l.*, and afterwards, according to the regular course of business upon the Stock Exchange, *Backhouse* gave *Mocatta* his crossed cheque for 2,000*l.* upon his bankers, and received from him the bonds.

This transaction was entered into by *Mocatta* upon the footing of *Backhouse* being solvent, and of his cheque being duly honoured, which *Backhouse*, in reliance on his receiving from *Bell* a cheque for 1,950*l.* in sufficient time for the clearing, believed would be the case.

*Backhouse* thus obtained possession of the bonds from *Mocatta*, on the faith of the crossed cheque, and what subsequently took place was detailed in the evidence, and was to this effect:—

About a quarter before three on the same day, *Bell's* son, pursuant to his father's instruction, came to *Backhouse's* office, holding in his hand a blank cheque, which *Wilkinson* (the clerk) supposed to be the cheque for 1,950*l.* *Bell's* son asked for the bonds, *Wilkinson* delivered them to him and asked for the cheque, *Bell* the younger informed him, that the money due upon them had been repaid a fortnight ago, and that they ought then to have been delivered up, and that he should therefore keep them, and that if he wanted any further explanation he had better come to his father. *Wilkinson* and *Bell* the younger thereupon went to the Defendant's office, and the bonds were delivered to him by his son. *Wilkinson* then applied to *Bell* for the cheque he had promised, when *Bell* positively refused to keep his promise, and said "these bonds are mine; I have the right to do the best I can to get my own property back; I owe Mr. *Backhouse*

*Backhouse* nothing." *Wilkinson* then returned to the office and communicated to *Backhouse* what had taken place.

1857.  
MOCATTA  
v.  
BELL.

*Backhouse*, on the same evening, went to *Mocatta*, and for the first time disclosed the name of his principal, and he informed him that his cheque for 2,000*l.* would be dishonoured for want of effects, and explained the above circumstances. Thereupon *Mocatta*, *Backhouse* and *Wilkinson* went to *Bell's* residence, when *Mocatta* expostulated with him and urged him to pay the sum which he had promised to advance to *Backhouse*, but *Bell* replied "that he had no dealings with *Mocatta*, and could only refer me to his solicitors." In consequence *Backhouse's* cheque was dishonoured for want of effects, and on the following day he was, in consequence, declared a defaulter on the Stock Exchange.

The above payments, arising out of transactions between members of the Stock Exchange, were made according to the practice and rules of the Stock Exchange, by means of crossed cheques passing through the clearing-house.

The Plaintiff had, since the delivering of the securities, received from the official assignee of the Stock Exchange, upon the distribution of *Backhouse's* estate, according to the rules of the Stock Exchange, 882*l.*, as a dividend upon his demand against *Backhouse*.

The Defendant stated, that *Backhouse* had made him the advance, and that *Backhouse* alone was his creditor; that nothing was said as to the source from which he was to obtain the money, nor did he (*Bell*) trouble himself to inquire whether the money advanced was *Backhouse's* or borrowed for the purpose from other parties.

VOL. XXIV.

Q Q

This



1857.  
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 MOCATTA  
 v.  
 BELL.

This bill was filed by *Mocatta* against *Bell*, and prayed a declaration, 1st. That the Plaintiff was entitled to a charge for 2,000*l.* and interest on the 10,710*l.* Spanish bonds, or might be declared entitled to the same advantage as if the bonds had remained in his possession, or as if the cheque given by *Backhouse* had been honoured. 2nd. That the Defendant might be ordered either to deliver up the bonds or pay the Plaintiff the 2,000*l.* and interest.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Waley*, for the Plaintiff.

Mr. *Schoyn*, and Mr. *Amphlett*, for the Defendant.

*The MASTER of the ROLLS.*

Nov. 21. The Defendant Mr. *Bell* must unfortunately have formed a very erroneous notion of the functions and duties of a Court of Equity to allow this case to come into Court; he must have been forewarned of the certain consequences of his acts, resulting from the decree which I am about to pronounce.

The state of the case, as Mr. *Bell* himself states it, cannot be put more favourably to himself than this :— that having deposited certain Spanish bonds with *Backhouse* to obtain money upon them, and money having been advanced for him accordingly, and having afterwards paid *Backhouse* the money for redeeming those bonds, he goes to *Backhouse* on the 16th of *September*, the day on which he is to receive them back, and asks for the bonds, for redeeming which he had paid the 2,000*l.*; thereupon Mr. *Bell* is informed that *Backhouse* has

has pledged them to the Plaintiff, stating his name, and also informing him that he *Backhouse* had misapplied the money which Mr. *Bell* had paid him, and had not applied it in redeeming the bonds. Thereupon Mr. *Bell* induces *Backhouse* to believe, if he goes to the Plaintiff and gives him a cheque for 2,000*l.*, or the amount which is due upon the bonds, that his cheque will be honoured, not by means of any funds which *Backhouse* had at his disposal, for he had next to none, but by means of funds which Mr. *Bell* will supply him with for the purpose of meeting that demand. Upon the faith of that belief, so produced, *Backhouse* goes to *Mocatta*, and gives him a crossed cheque for the amount due on the bonds, which, though he has no funds of his own at his bankers to meet, he firmly believes, at the time, will be met by funds to be supplied by *Bell*, according to his promise. *Backhouse* unintentionally was committing a gross fraud upon *Mocatta*, but that *Backhouse* intended no fraud is established by the evidence of Mr. *Bell* himself, who proves clearly that *Backhouse* firmly believed that the cheque would be duly honoured; by means of a cheque for 1,900*l.*, which, added with his own funds, would be sufficient for the purpose. If Mr. *Bell* intended at the time, (which I do not believe he did,) merely to make a delusive promise and to induce *Backhouse* to make a fraudulent representation unknowingly to *Mocatta*, he would have been clearly using *Backhouse* as his agent for the purpose of his (*Bell's*) committing a fraud against *Mocatta*. But whether he did or not is immaterial, for the moment that he gets the bonds returned, by refusing to give the cheque promised, he does, as it were *ex post facto*, commit a fraud; he does, by making the statements made by *Backhouse*, who believed them to be true, but which turn out to be utterly false, obtain the bonds by what is termed

1857.

~  
MOCATTA  
v.  
BELL.

1857.  
MOCATTA  
v.  
BELL.

a sort of trick, but which, in point of fact, is nothing less than a fraud, and which this Court always treats as one of a serious character when committed under circumstances of the like nature.

It is said that this case must be put upon a question of agency. In my opinion it is not at all necessary to put it upon a question of agency; the fact which I have mentioned is sufficient to dispose of it. But if it were to be put upon a question of agency, I have had no evidence laid before me, on the contrary, all the evidence which I have had stated to me bearing upon the subject leads to a contrary conclusion, to shew that it was not within the scope of the implied authority of a member of the Stock Exchange, when securities are deposited with him for the purpose of his advancing money upon them, to pledge those securities to some other person for that purpose. If that was within the scope of his authority, then *Backhouse* was the agent of *Bell* for the purpose of raising this money from *Mocatta*.

But assuming that it was not within the scope of his authority, what was it the duty of *Bell* to do when the matter came before him on the 16th of *September*? He should have said to *Backhouse*, "You had no authority to pledge these bonds to anybody; if you were not able to advance the money to me from your own funds upon the security of these bonds, you should have informed me so, because I would not have allowed you to part with them to any other person, and you ought to have given me that information at once." He ought thereupon to have gone to *Mocatta* and said, "*Backhouse* had no authority to pledge these bonds; you have no right to hold them, because you got them from a person who had no authority to part with them, and I shall insist upon

upon your returning them to me and obtaining the money from *Backhouse* as you can." But *Bell* never disputed the propriety of the transaction, or the implied authority, in that conference on the 16th of *September*; he never contested the authority of *Backhouse* to pledge his securities for the purpose of raising money upon them from other members of the Stock Exchange; on the contrary, his evidence states, that he was perfectly indifferent where the money came from, and that it was not for him to inquire, provided he got the money. All that would lead to the conclusion, that there was an implied authority which enabled *Backhouse* to pledge the bonds. Accordingly, instead of disputing the authority, Mr. *Bell* makes an arrangement, by which the bonds are to be obtained from the Plaintiff, upon a promise made by *Backhouse*, which *Bell* knew, from the best possible authority, it was totally impossible for *Backhouse* to make good, unless, in accordance with his own undertaking, he furnished him with the means of so doing. What possible defence is there to a case of this description?

Again, *Bell* says, "I believed at the time that the bonds were in *Backhouse's* safe, and I thought I saw them there." What was the course for him to adopt? Ought he not to have said, "I will not assent to any transaction of this description?" He might have said, "Let me see those bonds which you have got." Is it not obvious, that unless *Bell* had really lulled *Wilkinson* into the belief that the money promised by *Bell* would, to a certainty have been paid, he never would have got the bonds? Is it not obvious that *Wilkinson*, when he delivered the bonds up to *Alexander Bell*, believed that he had got a cheque to give him, in return for the amount which he had promised; and is it not also plain, that the Defendant could only have got the bonds  
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1857.

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MOCATTA  
v.  
BELL.

1857.

MOCATTA

v.

BELL.

by reason of that belief, and in consequence of the promises made by *Bell* previously?

It is said that *Bell* might have taken these bonds wherever he found them. I concur in this:—That while in the possession of *Backhouse*, as the owner, he might and would have been entitled to take them. I concur that if he had found them anywhere accidentally lying about, he would have been entitled to take them. But I dissent entirely from the notion that he would have been entitled to take them from *Mocatta*. They were not *Bell's* property; they were only his property subject to the existing charge upon them. They were no more his property than an estate is the property of a man after he has mortgaged it, and who has only an interest in the estate, subject to the payment of what is due upon the mortgage. The bonds were not in the possession of *Backhouse* as the owner, or of *Wilkinson*, when they were taken. In truth, the moment that *Backhouse* had obtained the possession of these bonds from *Mocatta*, by giving him a crossed cheque for the purpose, they were, until *Backhouse* was certain that *Bell* would perform the promise, and enable him to pay it, held by *Backhouse* as the agent of *Mocatta*, and *Wilkinson* was the agent of *Mocatta*, for the purpose of holding those bonds until he received the money for them, just as much as when a mortgagee delivers his mortgage bonds and the deeds of the estate to his solicitor to receive a cheque in return; he holds them, until the money is paid, as the agent of the mortgagee. Mr. *Bell* might have adopted the course I have stated, if he believed that these bonds were really in the safe; he might have asked to see them, and might have insisted upon their being shewn. If that had been refused, and he had had reason to believe they were there, he might have obtained an injunction from this Court in the course



course of twenty-four hours, to prevent *Backhouse* from parting with those bonds; he might have impounded them in his possession, and might afterwards have obtained possession of them. There were abundant means, if these bonds were really in the possession of *Backhouse*, by which *Bell* might have obtained possession of them, through the intervention of this Court, and without the necessity of having recourse to any violence or force, as has been suggested by counsel.

1857.

~~~~~  
MOCATTA  
v.  
BELL.

Then it is suggested, that *Backhouse* might possibly have done this:—He might have obtained the bonds by fraud from *Mocatta* upon the crossed cheque, and might then have pledged them to another person without any knowledge of it, and then the Plaintiff could only have obtained them from that person upon payment of the money. I concur in that argument. It is true that he might have committed a fraud upon *Mocatta*, and he might have made *Mocatta* the victim of such a fraud, but he had no intention and no desire to do it. But if a stranger had said to *Backhouse*, “If you will obtain these bonds from Mr. *Mocatta* upon such a statement, I will advance money to you upon them,” this Court would not, in that case, have allowed that person to retain them, but would have held that he was liable to make good to Mr. *Mocatta* the whole amount for which the cheque had been given, and upon which fraudulent representation, so made, the bonds had been obtained.

The only other argument is, that there was a want of caution, or some misconduct on the part of *Mocatta*, which ought to disentitle him to the favourable consideration of the Court. But so far from having heard anything of that sort, all that I have heard upon the subject is perfectly straight forward and plain on the part of Mr. *Mocatta*, acting as one would suppose any merchant

1857.  
MOCATTA  
v.  
BELL.

chant or man of business would act in the transaction of such business. He had made an arrangement that the bonds should remain till the next clearing day, which I suppose was about a fortnight after the time. *Backhouse* comes to him and says, "I wish to put an end to that arrangement, and pay you off before that day." *Mocatta* might say, "I will not hear of it." But on the contrary, he says, "By all means, pay me off if you think fit." Upon which he comes and gives him a crossed cheque. It is stated to me, that one of the rules of the Stock Exchange is, that a gentleman is bound to take a crossed cheque, unless he gives notice before eleven o'clock that day, that, with respect to that particular transaction, he insists upon bank notes. That makes it so much the stronger in favour of *Mocatta*, but it does not in the slightest degree alter the transaction, for even without that, what reason was there to doubt the word of a gentleman upon the Stock Exchange, that he could really pay him the money, and who firmly believed at the time that the cheque would be duly honoured, in accordance with the Defendant's representations?

What, then, is there that can be pointed out as wrong on the part of *Mocatta*? It is suggested, that though a crossed cheque is only payable to a banker, he might have gone to the banker who had to pay it, and have asked whether it would be honoured. The banker might say, "There are not assets now, but assets may be paid in before it is presented, and I cannot tell how that is." But you would put an end to all business, if it were held, that before a man took a crossed cheque, it was necessary for him to go personally and inquire of the banker whether that cheque would be duly honoured or not. When you consider the enormous number of cheques which must necessarily pass upon the Stock Exchange on the same day, such a doctrine

doctrine would be practically putting an end to all business. Besides which, it would be a most dangerous consequence, and would most seriously prejudice all commercial business, if it were believed, that the Court of Chancery could allow a gentleman, who had obtained possession of bonds by such means as these, to retain them against the mortgagee, and deprive him of the sum advanced by him on the security of their deposit.

1857.  
MOCATTA  
v.  
BELL.

The result therefore is, that there must be a decree for an account, unless the amount due is verified by affidavit, which probably will be better for the parties. It appears that Mr. *Mocatta* has received something from the estate.

Mr. *Roundell Palmer* :—Yes, Sir, he realized all he could.

*The MASTER of the ROLLS* :—It is quite idle to say that he has thereby relinquished his security. It was his duty to do that, and must of course give credit for it in the account. Take an account of what is due to him in respect of this transaction, with interest at 7l. per cent., the rate agreed on, during the whole time, together with the costs of this suit. If the amount be not paid, the bonds must be delivered up to the Plaintiff. I treat this as in the nature of a bill for a foreclosure.

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1857.

Nov. 18, 19,  
20.

Dec. 7.

## AUSTEN v. BOYS.

If two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the two original partners; the terms and conditions of the partnership which bind them bind him, unless a new contract be made between them.

And so also, if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified and involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself.

Solicitors agreed to become partners for seven years, and stipulated that, if either retired, the continuing partner should pay him the fair marketable value of his good will. One gave notice two days before the expiration of the seven years. Held, under these circumstances, that he was only entitled to the value of the goodwill as for two days, and not as of a going business.

In 1839, a retiring partner stipulated with the continuing partners that they should, at a future period, take his grandson *T.* into the business. In 1846, the continuing partners entered into articles for seven years, and by one clause (which formed no part of the partnership contract prior to that time) it was stipulated that any partner might retire, and the continuing partners should then pay him the value of his share in the "goodwill." Afterwards, in 1849, *T.* was admitted, but the memorandum arranging his admission specified little more than the share he was to take, and it was agreed that it should not annul the articles of 1846 as between the former partners. *T.* had no notice of the stipulation as to retirement. Held, that *T.* was not bound by it, though the former partners were; and, assuming that under it, the value of the goodwill was to be calculated as a perpetuity, still, that the arrangements of 1849 had cut it down and limited it to so much of the seven years as were unexpired at the time of the notice to retire.

THE suit was instituted by Mr. *Austen* against Mr. *Boys* and Mr. *Tweedie*, and a question arose in it, whether the Plaintiff was entitled to be paid for his share of the goodwill of the business of a solicitor, which he carried on in partnership with the Defendants down to his retirement therefrom in *September*, 1853.

The question arose under these circumstances:—In the month of *September*, 1836, three gentlemen, named *Forbes*, *Hale* and *Boys*, carried on business as solicitors in copartnership together. In *August*, 1838, upon the proposed retirement of *Forbes*, the Plaintiff became a partner, and articles were then entered into between *Forbes*, *Hale*, *Boys* and *Austen*, by which it was stipulated, that the business should, from the 1st of *September*, 1839,

1839, be carried on by *Hale, Boys* and *Austen* for seven years, and it was agreed that *Forbes* should be at liberty, at any future time, to introduce his grandson Mr. *Tweedie* into the business. The terms of the clause were as follows :—

1857.

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AUSTEN  
v.  
BOYS.

8. That *Hale, Boys* and *Austen* hereby severally agree with *Forbes*, "at any future time, to article A. F. *Tweedie*, if requested, before he attains twenty-one, and to admit him, when out of the articles, if competent and well conducted, to such a share of the business as shall be agreed upon between his guardians and the then continuing or surviving partner or partners, and in case of difference, to such a share as shall be settled by arbitration to be fair, relation being had to the terms upon which the said several partners have been admitted to the business, and the obligations all are under to Mr. R. H. *Forbes*, who laid the foundation of the business."

In *September*, 1839, Mr. *Forbes* retired from the partnership, which was afterwards carried on by *Hale, Boys* and *Austen*.

On the 24th of *July*, 1846, *Hale, Boys* and *Austen* entered into articles of partnership for carrying on the partnership for seven years from the 1st of *September*. After the usual clauses, the 10th and 11th and 13th were as follows :—

10. In case of the death of any partner, the partnership to go on till the 1st of *September* then next following, and the partnership to be then determined as to that partner, and the partnership property, such as the house, books, furniture, &c., to be valued, and the surviving partners or partner to pay off to the representatives of the deceased partner his share of such valuation



1857.

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AUSTEN

v.

BOYS.

tion on such 1st day of *September*, or else pay interest thereon till paid at the rate of six per cent. The surviving partners are also to pay to such representatives, on such 1st day of *September*, a sum equal to one-half of what a retiring partner would be entitled to, as the value of his share of the business on such 1st day of *September*, with interest till paid, at five per cent., upon the same principle as is laid down in the eleventh article of this agreement, &c.

11. Power for any partner or partners to retire, and, in that case, the continuing partners or partner to pay such retiring partner or partners, for his or their interest and share and *goodwill in the business*, the fair marketable value thereof by four equal annual instalments, with interest at five per cent. from the time of such retirement till paid, but such retiring partner or partners not to practise, either directly or indirectly, within 100 miles from the General Post Office, and use his best endeavours to promote the interests of the remaining partners.

13. This agreement to be subject to the 8th article of the existing partnership agreement with reference to Mr. *Alexander F. Tweedie*.

Mr. *Hale* died in *September*, 1848, and then the 10th clause was put in force for his benefit, and a sum was agreed upon, between the partners on the one side, and Mrs. *Hale* (the executrix) on the other, which was settled by the arbitration of Mr. *Forbes*, and paid to her.

In *September*, 1849, Mr. *Forbes* exercised the power of introducing his grandson Mr. *Tweedie* into the partnership, in pursuance of the covenant of *August*, 1838. He did this by sending a memorandum in writing to  
Mr.

Mr. *Austen* and Mr. *Boys*, which, as originally sent, was in these terms :—

1857.

*AUSTEN*  
v.  
*BOYS.*

“ *September*, 1849.

“ Memorandum of terms proposed, as regards Mr. *Tweedie*, with reference to the article between Messrs. *Hale* and Company and Mr. *Forbes*, in relation to Mr. *Tweedie*. Mr. *Tweedie* to return to *Ely* Place on the 1st of *November*, 1849. To be allowed, in the nature of salary, at the rate of 500*l.* per annum until 1st *September*, 1850; on that day, his name to be introduced into the firm after Mr. *Austen*’s. From 1st *September*, 1850, Mr. *Tweedie* to take one-fifth of profit and loss of the business until 1st *September*, 1853, from which date he is to share equally with the other partners.

“ In case of the death or retirement before 1st *September*, 1853, of either of the senior partners, his two-fifths to be divided into thirds, of which the surviving senior partner is to take two-thirds, and Mr. *Tweedie* one-third.

“ On the 1st *September*, 1850, it will be necessary to open a new account and new books, and Mr. *Tweedie* must bring in his proportion of capital to the new firm. That the partnership shall continue for 10 years from 1st *September*, 1850. That from 1st *November*, 1849, and during the partnership, Mr. *Tweedie* to submit to the direction and judgment of Mr. *Boys*, as to the particular department of business he is to attend to, and in all matters of the conduct of business or otherwise relating to the partnership concerns.

“ We agree to the above.”

This was signed by Mr. *Boys* and Mr. *Tweedie*, *simpliciter*.

1857.

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AUSTEN  
v.  
BOYS.

*pliciter*. It was also signed by the Plaintiff, but with this qualification:—"So far as Mr. *Tweedie's* share and position are fixed by this memorandum I hereby agree thereto; but as between Mr. *Boys* and myself, on the express understanding, that this memorandum is not to annul or prejudice the existing articles of partnership between Mr. *Boys* and me of the 24th of *July*, 1846, the stipulations of which (except so far as this memorandum affects Mr. *Tweedie's* interests) are (as between Mr. *Boys* and me) still to remain in force, and I will sign any further document for carrying these terms into effect."

Nothing further took place; these three gentlemen, the Plaintiff and the two Defendants, carried on business harmoniously and successfully together, without any further attempt to define or settle their rights and interests in the concern, until the close of the month of *August*, 1853. The Plaintiff, being then desirous of retiring, and disputes having arisen as to his rights on his retirement, he, on the 29th of *August*, 1853 (two days before the expiration of the partnership term as settled by the articles of the 24th of *July*, 1846), gave his co-partners a written notice to dissolve the partnership as from the following day, which dissolution accordingly took place on the 30th of *August*, 1853, twenty-four hours before it would have expired by effluxion of time, unless indeed it was extended by the memorandum of *September*, 1849. The Plaintiff thereupon retired from the profession.

The Plaintiff instituted this suit in *January*, 1856, alleging that there had been no final settlement of the partnership accounts. The bill stated, that he had applied to the Defendants "to pay him the full market value of his share in the said business and of the *goodwill* thereof,



thereof, pursuant to the 11th paragraph" of the articles, but that they had refused to comply with his request; "and they sometimes pretend, that although the Plaintiff is entitled to the full value of his share in the said business, yet that the co-partnership created by the articles and memorandum would have expired on the 1st of *September*, 1853, instead of the 1st of *September*, 1860, and that the value of his said share is only to be calculated with reference to the duration of the said co-partnership as expiring on the 1st day of *September*, 1853, and (as he retired within two days of that period) is therefore of only nominal value, and that Plaintiff was not entitled, after that day, to any share in the goodwill of the said business, and that *Tweedie* is not bound by the said first-mentioned memorandum, save so far as it introduced him into the partnership and regulated his share of the profits, and that the memorandum did not incorporate the provisions contained in the articles of the 24th of *July*, 1846, the contrary whereof Plaintiff shews to be the truth."

1857.

—  
AUSTEN  
v.  
BOYS.

In a subsequent passage the bill stated as follows :—  
"The Defendants are not justified in refusing to pay Plaintiff the full market value of his share of the said business and in the *goodwill* thereof, reckoning the same as a continuing business, and which is usually set at from two to four years' purchase, and, at the same time, to receive the benefit of Plaintiff's share in the said business, which has so accrued to them by his retirement, and of his exertions and endeavours to promote the same, which exertions have actually been exercised by Plaintiff."

The bill prayed :—1. That the partnership created by the articles and memorandum might be declared to be dissolved

1857.  
  
 AUSTEN  
 v.  
 BOYS.

dissolved by the notice of the 29th day of *August*, 1853, as on the 30th day of *August*, 1853.

2. That an account might be taken of the partnership dealings and transactions, and the partnership wound up.

3. That the value of Plaintiff's share in the said business and in the *goodwill* thereof, according to the average number of years' purchase usually paid in such cases or otherwise, might be ascertained and declared, pursuant to the provisions of the 10th and 11th paragraphs of the articles, reckoning the same as a continuing business, and not as terminating on the 1st day of *September*, 1853.

4. That the Defendant might be decreed to pay to the Plaintiff whatever might be found due to him with interest.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Burdon* for the Plaintiff.

Mr. *Lloyd*, Mr. *Schwyn*, and Mr. *W. H. Clarke* for *Boys*.

Mr. *Rolt*, Mr. *Follett*, and Mr. *Rasch* for Mr. *Tweedie*. *Colyear v. The Countess of Mulgrave* (a); *Booth v. Parks* (b); *Whittaker v. Howe* (c); *Bozon v. Farlow* (d); *Essex v. Essex* (e); *Colman v. Sarrel* (f); *Candler v. Candler* (g) were referred to; and see *Const v. Harris* (h); *Geddes v. Wallace* (i).

*The*

- (a) 2 *Keen*, 81.
- (b) 1 *Molloy*, 465.
- (c) 3 *Beav.* 383.
- (d) 1 *Mer.* 459.
- (e) 20 *Beav.* 442.

- (f) 1 *Ves. jun.* 50.
- (g) *Jacob*, 225.
- (h) *Turn. & R.* 523.
- (i) 2 *Bligh. (O. S.)* 273.

*The MASTER of the ROLLS* reserved judgment.

1857.

*AUSTEN*  
v.  
*BOYS.*

*The MASTER of the ROLLS.*

Dec. 7.

The question in this case is, whether the Plaintiff, in the circumstances I am about to detail, is entitled to be paid for his share of the goodwill of the business, which he carried on with the Defendants as his copartners up to the time of his retirement.—[*His Honor stated the facts of the case.*]

The articles of partnership of *September, 1846*, between *Hale, Boys* and *Austen* did not profess to, as indeed they could not, affect *Mr. Forbes* or his rights under the covenant of *August, 1838*, which I have already read, and who had received no compensation or consideration for his share of the business on retiring therefrom, and, accordingly, his rights with respect to the introduction of *Mr. Tweedie* remained exactly the same as if the articles had never been signed. It is also admitted, that the articles relative to the payment of the share of a dying or retiring partner formed no part of the partnership contract prior to the month of *July, 1846*.

This suit is instituted to take the partnership accounts; this is a matter of course, if the parties differ about them, but the question in dispute relative to the accounts, and which has been argued before me, and which it is important to determine on the present occasion, is, whether *Mr. Austen* is entitled to be paid, on his retirement, under the eleventh clause of the articles of 1846, and, if so, how much, and whether both the Defendants are liable to make such payments to him.

VOL. XXIV.

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I shall,

1857.

AUSTEN  
v.  
BOYS.

I shall, in the first place, consider how the matter stands as regards the Defendant *Tweedie*. There is no doubt, that if two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the two original partners; the terms and conditions of the partnership which bind them bind him, unless a new contract be made between them. So also, if the conditions of his becoming partner are partially set forth, to the extent that they are not specified and involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself.

But Mr. *Tweedie's* admission as a partner is under very peculiar and unusual circumstances, it is not the case of two partners admitting a third, on such terms or conditions as they may agree upon, but it is the case of two partners contracting, for value, with a stranger, to admit a specified third person to be a partner with them, on such terms and subject to such conditions as they and this stranger may settle between them, subject to arbitration in case of difference. This was the effect of the covenant entered into with Mr. *Forbes*, but containing, at the close of it, a provision, that the terms of such admission were to be settled with regard to the obligation the partners were under to the founder of the business, who was the grandfather of the gentleman to be admitted into the partnership.

At the time when this contract was entered into, the partnership, as then carried on by *Hale*, *Boys* and *Austen*, did not contain any clause relative to the purchase of the share of a dying or retiring partner; the covenant therefore, was a covenant to admit Mr. *Tweedie* into

into the partnership as it then stood, on terms to be agreed upon.

1857.

AUSTEN  
v.  
BOYS.

It was clearly not in the power of the continuing partners to enter into such additional stipulations and rules of partnership as should make the admission of Mr. *Tweedie* into the business either impossible or injurious to him. They could not thereby invalidate the covenant with Mr. *Forbes*; such stipulations would not bind him or Mr. *Tweedie*, unless he and Mr. *Forbes* had agreed to them. At the same time, both Mr. *Forbes* and Mr. *Tweedie* might have adopted any stipulations and conditions in the existing partnership, and might have consented that Mr. *Tweedie* should be bound by them.

It remains to be considered, on the evidence, whether they did so consent. On the evidence it is clear, that Mr. *Forbes* was aware of the stipulation for the purchase of the share of a deceased or retiring partner, which had been entered into by *Hale, Boys* and *Austen*. It is also clear, that Mr. *Tweedie* did not know of it, Mr. *Forbes* says (and I see no reason to doubt the accuracy of his statement) that it was not present to his mind when he wrote and sent the memorandum of *September*, 1849. Mr. *Tweedie* cannot be held to have consented to it, for he did not know of its existence, and there was nothing on the face of the document of *September*, 1849, to indicate the existence of such a provision. The terms of the memorandum of *September*, 1849, do not appear to me to bear the construction, that such a provision applied to Mr. *Tweedie*, or that it was intended to have such an application by either Mr. *Forbes*, Mr. *Boys* or Mr. *Austen*. If it did so apply, the consequences, on either side, might have been very injurious. On the one hand, the day after entering into this arrangement, both Mr. *Boys* and Mr. *Austen* might

1857.

*AUSTEN*  
v.  
*Boys.*

have given notice of retirement, and Mr. *Tweedie* would have had to pay for the goodwill of the business to both, when, upon their retirement, the goodwill would probably have been reduced to nothing, as the clients of the firm would probably not have continued their business with a house consisting of one person only, and that person a young man untried in business, entering it for the first time and personally unknown to the clients, after both the persons in whom the clients had reposed confidence had retired. The effect in that case would simply have been, to compel Mr. *Tweedie* to pay a large sum of money to Mr. *Boys* and another to Mr. *Austen*, and to leave himself where he was before he paid the money, and wholly frustrate the object of Mr. *Forbes* in obtaining the covenant.

On the other hand, if Mr. *Tweedie* gave notice the day after his admission, he would, under pretence of being admitted as a partner and affording his services and assistance for the carrying on of the business, have obtained a considerable sum of money from Mr. *Boys* and Mr. *Austen*, and all parties would have remained as they were, for the covenant by *Tweedie* not to practise would have been of little or no value to *Boys* and *Austen*.

In my opinion, the fair inference to be derived from the memorandum of *September*, 1849, alone is, that it did not (on the assumption that the parties to it were aware of the clauses 10 and 11 in the articles of *July*, 1846) contemplate that Mr. *Tweedie* should be affected by the clauses providing for the payment of the share of a deceased or retiring partner. If this be the fair construction of the document, taken by itself, how does it stand in the knowledge of the parties themselves. Mr. *Tweedie*, as I have already stated, did not know of it.  
Mr.

Mr. *Forbes* knew of it, but it was not present to his mind nor did it enter into his suggestions as an ingredient in the terms on which Mr. *Tweedie* was to be admitted. Mr. *Boys* says, that he considered that the new arrangement virtually superseded the existing partnership articles, and that it was a new contract and arrangement on the footing of the memorandum of *September*, 1849. Mr. *Austen* seems to have thought, that such would have been the effect of the memorandum taken by itself, and accordingly, he expressed his view of the case by a note in writing, which he appended to the document of *September*, 1849, and in which states his views and the footing upon which he signed the document, and on which condition alone he attached his name to it.

1857.

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AUSTEN  
v.  
BOYS.

This note I think it desirable to read over again—"So far as Mr. *Tweedie's* share and position are fixed by this memorandum, I hereby agree thereto, but as between Mr. *Boys* and myself, on the express understanding that this memorandum is not to annul or prejudice the existing articles of partnership between Mr. *Boys* and I of the 24th *July*, 1846, the stipulations of which (except so far as the memorandum affects Mr. *Tweedie's* interests) are (as between Mr. *Boys* and I) still to remain in force, and I will sign any further document for carrying the terms into effect."

I think that the plain meaning of this note is this : —that as between Mr. *Boys* and myself, the existing articles of partnership are to remain in force, but this is not to affect Mr. *Tweedie*, his interests are unaffected thereby, that I agree to, but I insist that the articles are still in force between Mr. *Boys* and myself, as far as may be possible, consistently with a full preservation of Mr. *Tweedie's* interests under the memorandum of *September*, 1849.

In

1857.

AUSTEN  
v.  
BOYS.

In truth, it could scarcely be possible to express this meaning more clearly or distinctly than Mr. *Austen* has done, were it now desired to put this meaning into a clause, to be inserted in the articles. The Plaintiff says, Mr. *Tweedie* did not object to the memorandum being so qualified; why should he? his "share," his "position," his "interests" (to use the words of the note) were to be fixed by the memorandum of *September*, 1849, and were not to be affected by this note. If Mr. *Austen* had intended that Mr. *Tweedie* should be affected by this clause in the partnership articles between Mr. *Boys* and himself, he ought to have given him express notice of it, and the terms of his admission ought to have been settled with regard to this provision in the existing articles, but without such notice it would be scarcely possible that Mr. *Tweedie* should be affected by it. Instead of doing this, he signs a note, expressly admitting that Mr. *Tweedie's* "share, position and interests" are not to be affected by them. It is impossible, after this, for the Plaintiff successfully to contend, that Mr. *Tweedie* is bound by these clauses; he is, in my opinion, wholly unaffected by them.

The question therefore will be reduced to this:—what is the effect of the transaction between and as regards the Plaintiff and Mr. *Boys*? As between these gentlemen, I think that the articles of *July*, 1846, must be treated to have been in force after the execution of the memorandum of *September*, 1849. It is clear that they were in force before the execution of that memorandum. Mr. *Austen*, on signing it, says that the articles are to remain in force, as between himself and Mr. *Boys*, so far as may be possible, without affecting Mr. *Tweedie's* interest. Mr. *Boys* dissents from that view and treats the articles as at an end; but the existing contract  
between



between the parties can only be got rid of by a fresh contract, and only to the extent that the fresh contract controls the former. If he intended the old articles to be superseded, it could only be on some express agreement, as between himself and the Plaintiff, and no such agreement was come to.

I am of opinion, therefore, that the existing articles were in force after *September*, 1849, as between the Plaintiff and *Boys*, and that they were only modified, so far as was necessary for the purpose of giving *Tweedie* his full share and interest in the partnership, according to the memorandum of *September*, 1849, unaffected by such of the provisions of the articles of *July*, 1846, as might apply to him. To this extent, there was, in my opinion, a plain contract between the three so to modify or to treat as modified the articles of *July*, 1846.

Taking this view of the matter, it is important to consider the articles of *July*, 1846, and the memorandum of 1849 together. By the articles alone, a partnership existed between Plaintiff and *Boys* up to the 1st of *September*, 1853, with a right to either to retire, and be paid his share of the goodwill. By the memorandum, in case either retired before the 1st *September*, 1853, up to the 1st of *September*, 1853, the share of the retiring partner was to be divided, so that Mr. *Tweedie* was to take one-third of such profits, and the continuing partner two-thirds of such profits; and after the 1st of *September*, 1853, all were to be equal. If there were three partners, *Tweedie* was to take one-third of the profits, if only two, he was to take one-half of the profits. The effect would be, that if the clause providing for the payment of a retiring partner's share is to have an operation, as against the Plaintiff and *Boys*, subsequently to the 1st of *September*, 1853, it would give  
Mr.

1857.

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AUSTEN  
v.  
BOYS.

1857.

*AUSTEN*  
v.  
*BOYS.*

Mr. *Tweedie* one-half of the profits arising from a share which had been paid for by his partner. This is manifestly unfair, and could not be intended to be the effect of the transaction. It is true, that this circumstance is relied upon, for the purpose of shewing that Mr. *Tweedie* was to be affected by the articles of *July*, 1846, but I have already stated my reason for coming to a different conclusion. On the assumption, therefore, that *Tweedie* was not affected by this clause respecting retirement, and that the clause was to be in full force as regards the other two, exactly as if the arrangement of *September*, 1849, had not been entered into, it seems to me to be impossible successfully to contend, that the clause for retirement was to have any operation after the 1st of *September*, 1853.

I do not enter into the questions, whether, if no arrangement had taken place between Mr. *Tweedie* and the other partners, the clause relative to retirement could be acted upon, by *Austen* or by *Boys*, up to the last day of *August*, 1853, so as to have the same operation, as if the business, of which the goodwill was to be bought, was to be treated as a going business, the perpetual duration of which would remain with the sole continuing partner. I do not, therefore, pursue the argument, as to the difficulties which might arise from that consideration, in case the notice was given by both partners to the other simultaneously, or by one to the other immediately on the receipt of his notice; nor do I notice the argument of the injustice that might be produced on one, who might have to pay the other for a business which he neither intended or was able to carry on. But omitting all these considerations, and assuming the true effect of the articles of *July*, 1846, taken by themselves, to be, that one partner might, on any day before the 1st of *September*, 1853, give to the other  
partner

partner notice of his intention to retire, and thereby become entitled to payment of his share of the goodwill of the business, as a perpetuity, still, on that assumption, I am of opinion, that by the operation of the memorandum of *September*, 1849, and the arrangement then come to, the effect of that clause, in the articles of *July*, 1846, was cut down and limited to the duration of that term, and that if one partner retired prior to that period, he was to be paid merely for the value of the goodwill, during the period which might elapse from the date of the notice till the expiration of the term of the partnership, as it subsisted between them, independently of *Tweedie*. Messrs. *Boys*, *Austen* and *Tweedie* were partners together till the 1st of *September*, 1853, with a sub-agreement affecting only the two former partners during that period, and so affecting them as not to touch the position or interests of *Tweedie*; but after 1st of *September*, 1853, *Boys*, *Austen* and *Tweedie* were to be partners on a footing expressed in the memorandum of *September*, 1849, and were unaffected by any arrangement entered into by *Boys* and *Austen* alone. Therefore, on and after the 1st of *September*, 1853, *Austen*, *Boys* and *Tweedie* were to be partners in equal shares, and if one retired the other two were to share the profits thus released between them. It is inconsistent with such an arrangement, that either *Austen* or *Boys* should be at liberty to retire and compel the other to buy his share for the benefit of *Tweedie*, who was not bound by the clause or liable to contribute to the purchase. It was, therefore, a new arrangement; it was, in fact, a new firm, as the memorandum expresses it, from *September*, 1850, which, but for the note of *Austen*, would, in my opinion, have wholly superseded the articles of 1846. The Plaintiff's note keeps these claims alive, as between himself and *Boys*, so far as it does not affect *Tweedie*; and the only mode,

1857.

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AUSTEN  
v.  
BOYS.

1857.

AUSTEN  
v.  
BOYS.

mode, in my opinion, to produce that effect and to arrive at that result specified in the Plaintiff's note, is to say, that when the Plaintiff gave the notice of retirement to *Boys*, he became entitled to be paid for the goodwill of the firm, for the two days which elapsed after he gave his notice before the arrangement between *Boys* and himself was to come to an end. This is to be estimated by the profits made, and is clearly next to nothing; but such as it is, it is, in my opinion, all that the Plaintiff is entitled to.

There must be a decree in the terms of the 1st and 2nd paragraphs of the bill, with the usual directions for taking partnership accounts. The bill will be dismissed, so far as it prays the relief prayed in the 3rd paragraph of the bill, without costs, as regards the Defendant *Boys*; but if the Defendant *Tweedie* asks for costs of the part of the bill, he must have it, because the relief appears to me to be quite inconsistent with the note signed by the Plaintiff himself, but probably this will not be asked for, it can be but small; I could only give it, to the extent that the costs of the suit have been increased, as regards the Defendant *Tweedie*, by praying the relief in the 3rd paragraph as against him. The bill, in other respects, is quite proper, and the Plaintiff is entitled to have the accounts taken in this Court. Mr. *Boys* and the Plaintiff have, in a great measure, given rise to this question between themselves, by the mutual disinclination they seem to have felt, in *September*, 1849, to come to a determinate arrangement and settlement of this question between them, and by allowing it to remain open, one insisting that the articles of 1846 were still in force and the other that they had been put an end to.

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NOTE.—Affirmed by Lord *Chelmsford*, L. C., *June* 24, 1858.

1857.

BIRDS v. ASKEY. (No. 1.)

THE testator, by his will, dated in 1847, gave all his real and personal property to trustees, their heirs, &c. in trust for his wife for her life, "and from and after the decease" of his wife, upon trust out of the rents of his *Long Preston* Estate to pay two annuities of 40*l.* each to his two sisters for life, and subject and charged therewith, as to his *Long Preston* Estate, upon trust to pay the remainder of the rents to his brother *John Hammond*, for his life, and after his death, to his children for life [the subsequent limitations being void for remoteness]. He directed 9,000*l.* to be raised out of his personal estate, and applied in a specific manner, and then came the residuary clause which was as follows:—

"And as to for and concerning the rest, residue and remainder of my estate and effects whatsoever, real or personal, *not hereinbefore disposed of or which may remain after satisfying the trusts of this my will*, I give, devise and bequeath the same unto my said brother *John* (if then living), his heirs, executors, administrators and assigns, according to the respective natures and qualities of such estate and effects. But in case my said brother *John* shall *then* be dead, *then* and in such case, I give, devise and bequeath all and every the residue and remainder of my aforesaid estate and effects unto and equally amongst the child or children of my said brother *John* absolutely, share and share alike."

The testator died in 1852, his brother *John* in 1853, leaving four children, and his widow in *May*, 1854.

Dec. 5, 8.

A testator devised his real and personal estate in trust for his wife for life, and after her decease, he devised a real estate to his brother for life, with remainder to his children. He proceeded thus: and as to the residue of my estate and effects "not hereinbefore disposed of, or which may remain after satisfying the trusts of this my will," I give the same to my brother (if then living), his heirs, &c. "But in case my brother shall then be dead, then and in such case I give" the residue of my estate and effects to his children. The brother died in the life of the widow. Held, that the residue vested in him at the testator's death.

Mr.

1857. Mr. *R. Palmer* and Mr. *Little* for the Plaintiff, the residuary devisee and legatee of the widow.

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BIRDS  
v.  
ASKY.

Mr. *Selwyn* for the heir.

Mr. *Bagshawe* and Mr. *Milne* for the trustees.

Mr. *Lloyd*, for the children of *John Hammond*, contended, that the residue never vested in him, he not having survived the widow, or the period at which the trusts of the will were satisfied.

*The MASTER of the ROLLS.*

Dec. 8. This question arises on the construction of the residuary devise in the will of *Thomas Hammond*.

The scope of the will is this : he gives all his property, real and personal, to trustees, in trust for the wife for her life. Then after her death, as to a portion, to raise annuities, and subject thereto, to his brother *John* for life, with remainder to his children and their issue, then, out of his personal estate, he directs a sum of 9,000*l.* to be raised and applied in a specified manner, and then comes the residuary clause which is in these words, "And as to"—[see ante, p. 615].

The question is, who is to take under this gift, the brother *John* having survived the testator, but died in the lifetime of the widow. The question is, when the residue is to be paid to, or to become vested in *John*. Is it on the death of the testator, or at the decease of the widow, or at the termination of the trusts declared by his will.

The construction contended for by the children of the  
testator's

testator's brother is, that the residuary gift never vested in *John*; if so, that might let in the heir-at-law of the testator; in which case this question could not be decided in his absence.

1857.

  
BIRDS  
v.  
ASKET.

The clause itself points to two species of property, first, the property "not heretofore disposed of," and, secondly, the property "which might remain after satisfying the trusts of this my will." Why is the property not disposed of to be kept until after the trusts of the will are all at an end? and yet the property given as residue cannot vest at different periods, as to one part at the death of the testator, as to another at the death of the widow, and as to a third at the completion of the trusts. I cannot read the words "after satisfying the trusts of this my will," as equivalent to "after the trusts of my will shall have been completed," because in that case it would be absurd to give anything to *John*, who must necessarily die before the completion of the trusts consequent upon his decease, and limited to take place after that period.

To read these words as equivalent to "after the death of the widow," is to give an arbitrary meaning at the mere will of the Court; because why should the Court stop when some of the trusts are concluded, and hold that these words mean when the first trust which affects the whole property is concluded, but not sooner.

The only rational construction I can give to it is, that the words, "after satisfying the trusts of my will," mean after providing for the due execution of the trusts of my will, which is a duty which falls on his executors immediately on his decease, and in that case, the words can only apply to the period when that duty falls on the executor, viz., at the death of the testator.

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1857.

BIRDS  
v.  
ASKEY.

I am told that this construction will in effect disappoint the children of *John*. I regret the consequence, but I must construe the will according to what appears to me to be the meaning of the words the testator has employed.

1858.

Jan. 21.

A trustee advanced to *A. B.* (one of his *cestuis que trust*) a part of the trust funds, to enable him to purchase a real estate. *A. B.* died without having repaid the money, having devised the estate, and his personal estate was insufficient to pay his debts and legacies. Held, first, that there was a lien on the estate for the trust funds; and, secondly, that the pecuniary legatees had, as against the devisees, a right of marshalling, so as to have the lien satisfied, primarily, out of the purchased estate.

## BIRDS v. ASKEY. (No. 2.)

ANOTHER question arose in this case under the following circumstances, which were found by the Chief Clerk's certificate:—

By a settlement, dated the 5th day of *July*, 1838, and made on the marriage of *Thomas Hammond* (the testator) with *Catherine* his wife, a sum of 10,000*l.* was transferred to trustees, upon trusts to invest, and to pay the interest arising from it to *Catherine Hammond* for life, and after her decease, in case she should happen to survive *Thomas Hammond* (which event happened), then upon trust to call in the trust moneys, and pay one half unto such person as *Catherine Hammond* should appoint, and pay the remaining half part unto such person as *Thomas Hammond* should, by his will, appoint.

On the 2nd *August*, 1839, *Thomas Hammond* and his wife saw the trustee and informed him that he, *Thomas Hammond*, had purchased a farm at *Long Preston* for the sum of 5,918*l.* and that he required that sum to be advanced to him, out of the said sum of 10,000*l.*, to complete the said purchase.

On the same day, the trustees of the settlement paid  
over



over the sum of 5,918*l.* for that purpose to *Thomas Hammond*, who laid it out in the purchase of the estate at *Long Preston*, which was conveyed to him on the 16th day of *May*, 1840.

1858.  
BIRDS  
v.  
ASKEY.

*Thomas Hammond* died seised of the *Long Preston* estate, and by his will he devised that estate to his brother *John* and his children, as before mentioned (a). He had never repaid any portion of the 5,918*l.*, and it was found to be a debt due from the testator to the trustees.

The personal estate was deficient about 1,500*l.* to pay the debts and legacies, and the question was, whether the debt, 5,918*l.*, was to be paid by the devisees of the *Preston* estate.

Mr. *Palmer* and Mr. *Little* for the Plaintiff, who was entitled to one-half the 5,918*l.*

Mr. *Greene*, for the legatees of 9,000*l.* under the testator's will, argued that the doctrine of marshalling was applicable, and that the deficiency of the personal estate to pay the debts and legacies ought to be raised out of the *Long Preston* estate.

Mr. *Bagshawe* for the trustees.

Mr. *Speed*, for the younger children of *John*, argued that the trust-money invested in land was personal estate.

Mr. *Lloyd*, for the heir of *John*, insisted that there was no lien on the estate for the 5,918*l.* and that if there was, still the pecuniary legatees had no right to stand in

(a) See *ante*, p. 615.

1858.

BIRDS  
v.  
ASKBY.

in the place of the party entitled to the lien, as against devised estates, though a contrary rule prevailed in the case of descended estates. That it was only in cases of express contract creating a charge on the real estate, that the pecuniary legatees were entitled to marshal the devised estates.

The following cases were also cited: *Paterson v. Scott* (a); *Aldrich v. Cooper* (b); *Long v. Short* (c); *Mirehouse v. Scaife* (d); *Forrester v. Lord Leigh* (e); *Sugden's Vendors* (f); *Coppin v. Coppin* (g).

#### *The MASTER of the ROLLS.*

On this point I entertain little doubt. The principle is well stated by Vice-Chancellor *Wigram* in the case of *Johnson v. Child* (h). He says, "It is not very easy to understand the principle upon which the Court has proceeded in some of the cases referred to. The rule of law is clear, that a testator, by devising lands expressly 'subject to a mortgage,' does not thereby declare any intention that the devisee shall take *cum onere*, as against the testator's personal estate. It is equally well settled, that the amount of a testator's general personal estate is not a circumstance from which any inference can be legitimately drawn as to the construction of his will. Yet, if the amount of a testator's personal estate be insufficient for the payment of his debts and legacies, the Court discovers an intention on the part of the testator, that the devisee of his real estate, subject to a mortgage, should take it *cum onere*."

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- (a) 1 *De G., M. & G.* 531.
- (b) 8 *Ves.* 396.
- (c) 1 *P. Wms.* 403.
- (d) 2 *Myl. & Cr.* 695.

- (e) *Amb.* 172.
- (f) *Ch.* 18, s. 2.
- (g) 2 *P. Wms.* 291.
- (h) 4 *Hare*, 94.

The difficulty I have in reconciling the cases is this:—I think Vice-Chancellor *Wigram* accurately expresses it, when he says, that it is a question of intention, whether the testator intended the devisee to take *cum onere*, and it has been held by Courts of Equity, that when the testator devises an estate which is charged with a burden, and his personal estate is not sufficient to pay his debts and legacies, the Court, from that circumstance, discovers an intention that the devisee shall take it *cum onere*, and that the charge shall be paid out of the real estate. In one of the cases referred to, *Wythe v. Henniker* (a), or *Selby v. Selby* (b), Sir *John Leach* considered the case of a vendor's lien an exception to the usual rule as between pecuniary legatees and devisee. But in *Sproule v. Prior* (c) it was held, that pecuniary legatees had a right to have the assets marshalled, as against the heir of the testator, who purchased but died without having paid for an estate.

I admit that if the doctrine does not apply to a vendor's lien, it cannot be said that it applies to all equitable charges; yet it is admitted that it applies to an equitable mortgage, though created by a parol agreement that there should be a charge on the estate. But I cannot accede to the argument, that it only extends to those cases where there is an express contract on the subject.

A very nice distinction might arise between a case of this description:—where money had been lent by a trustee to a husband simply on his personal security,  
and

(a) 2 *Myl & K.* 641.

(c) 8 *Sim.* 189.

(b) 4 *Russ.* 336.

1858.

BIRDS  
v.  
ASKEY.

1858.

BIRDS  
v.  
ASKY.

and where the trustee finds that it has afterwards been applied in purchasing an estate (a), and a case like the present, where the Chief Clerk has found, that the money was borrowed for the express purpose of laying it out in the *Long Preston* estate. Here there must have been something very analogous to contract, for I must impute to both parties a knowledge that the money was lent for payment of the purchase-money, and an understanding that the estate would be liable to the trustee for its repayment. That is very distinguishable from the case where money has been simply lent on the borrower's personal security.

If the argument of Mr. *Lloyd* were to prevail, that it is only in cases of express contract that the doctrine applies, then this, as found by the certificate, would be one of that description. I do not, however, accede to that view. It must I think be admitted that the case of lien for purchase-money is an anomalous one; for on what principle it differs from other liens on the estate I am at a loss to understand.

In this case I am of opinion, that there is a lien, and that the personal estate being insufficient to pay the debts and legacies, it must be taken that the testator intended that the devisee should take the estate subject to the charge on it.

(a) See *Lane v. Dighton*, *Lench*, 10 Ves. 516; *Pennell v. Amb.* 409; *Taylor v. Plumer*, *Deffell*, 4 De G., M. & G. 381. 3 *Mau. & S.* 562; *Lench v.*

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1857.

HOLGATE v. JENNINGS.

**T**HIS was a summons to vary the Chief Clerk's certificate, so far as related to charging the executrix, *Susanna Jennings*, with a sum of 249*l.* 2*s.* 4*d.*

The testator, by his will, gave to his wife *Susan Jennings* and his nephew "all the rest, residue and remainder of his real and personal estate, moneys, securities for money, and all other his effects, of what nature or kind soever, and wheresoever situate, of which he should die possessed at his death," upon trust to pay a certain annuity, and, "in the next place, to pay over the several legacies following within six months after his decease, if provided they should so soon be enabled to collect and get in the same." [These amounted to 1,600*l.*] "And as to the rest, residue and remainder of his said *estate and effects*, in trust to pay over the *annual proceeds thereof* unto his wife *Susanna Jennings* for and during her life," and after her death "to distribute and divide the whole of his said residuary estate and effects unto and amongst his four nephews *Joseph Crew Jennings, Thomas Robert Jennings,*" and two others who were named.

The testator died 24th *January*, 1854, possessed of

Dec. 11.  
A testator gave 16,000*l.* in legacies payable within six months, and the residue to his widow for life, with remainder over. He died possessed of a large sum in the Consols. The widow, who was executrix, received the first half-yearly dividends on the Stock, and then sold sufficient to pay the legacies. Held, that she was not entitled, as tenant for life, to the dividends on the stock producing the 16,000*l.*, but that it formed *corpus*.

A testator gave the residue of his estate and effects, in trust to pay "the annual

proceeds to his wife" for life, and after her death, to divide "his said residuary estate and effects" between his nephews and nieces; and he directed that his nephews, in the division, should take such parts of the joint property as he held with them. Part of the joint property was leasehold. Held, that the tenant for life was entitled to enjoy the whole perishable property *in specie*.

Where a tenant for life is entitled to enjoy *in specie*, the rule is, that investments may remain, but debts, as turnpike bonds, must be realized.

1857.  
HOLGATE  
v.  
JENNINGS.

Consols and other sums in the funds to a very large amount. He had received the *January* dividend shortly before his death. The Defendant *Susan* alone proved the will. She received and retained for her own use, as tenant for life, the *July* dividends on the whole of the Consols, and then, on the 20th *July*, sold a sufficient part of the Stock (16,279*l.* 17*s.* 10*d.*) to pay the 16,000*l.* legacies.

The nephews, who were entitled to the *corpus* of the residue after her death, claimed to have the dividends on the 16,279*l.* 17*s.* 10*d.*, which amounted to the above-mentioned sum of 249*l.* 2*s.* 4*d.* accounted for as part of the residuary estate.

The Chief Clerk thought, that such dividends (having accrued within six months of testator's death on the sum bequeathed as legacies) formed no part of the income of the residuary estate, and therefore could not belong to the tenant for life, but necessarily fell into the residue, by accretion, and formed part of the *corpus*. He accordingly charged her therewith. The executrix took out a summons to vary the certificate on that point, which came on for argument in Court.

Mr. *Lloyd* and Mr. *George L. Russell* for the widow. The point now brought forward is perfectly new; it has never yet been brought before the consideration of the Court, and is not governed by the principles of any decided case. In this instance, the fund was, at the death of the testator, in its proper state of investment in Consols. Nothing, therefore, which could arise in respect of income could properly belong, as *corpus*, to those in remainder. An executor may, for the convenience of the estate, postpone paying the legacies until twelve months after the testator's death; but this is for  
the

the convenience of the estate, not for the benefit of the remainderman, and it does not alter or vary the nature of the assets as regards income and capital, or the rights as between the tenant for life and remainderman. The only object is to give the executor time to ascertain the state of the assets and to enable him properly to administer them, but he is nevertheless perfectly justified in paying the legacies the day after the testator's death.

Here the will accelerates the usual period, and gives a peremptory direction that the legacies shall be paid at least "within" six months, but still allowing the executor, if he pleases, to pay them immediately after the testator's decease.

[*The MASTER of the ROLLS.* Suppose he had directed the legacies to be paid eighteen months after his death?] In that case, it is clear, that the *corpus* would be preserved during that period, and that the intermediate interest would belong to the tenant for life, in the same way as if he had directed payment after the death of the tenant for life, or at the expiration of eighteen years.

Subject to due provision being made for the legacies, the tenant for life is entitled to everything arising from accretion or income, the remainderman to everything producing it, or the capital; but it would be a strange proceeding, in dealing with the testator's assets, to give any part of the income to persons who are only entitled to the capital. If a man were to die leaving nothing but Consols, they would form the capital, and all the future dividends the income. If a legacy were given to A. when he returned from *Rome*, the interest in the meantime would belong to the tenant for life, and when the necessity for breaking in upon the capital

1857.

HOLGATE  
v.  
JENNINGS.

1857.  
  
 HOLGATE  
 v.  
 JENNINGS.

capital arose for payment of legacies, the *corpus* of the fund would alone be resorted to for their payment. The certificate is therefore wrong in charging the widow with the 249*l.* 2*s.* 4*d.*

They referred to *Morgan v. Morgan* (a); *Macpherson v. Macpherson* (b); *Hewitt v. Morris* (c); *Angerstein v. Martin* (d); *Taylor v. Clark* (e); *La Terriere v. Bulmer* (f); *Stott v. Hollingworth* (g); *Douglas v. Congreve* (h); *Dimes v. Scott* (i); and see *Cranley v. Dixon* (k); *Wilkinson v. Duncan* (l).

Mr. *R. Palmer* and Mr. *Shebbeare* for the Plaintiff, and Mr. *H. F. Shebbeare*, for another Defendant, were not heard.

*The MASTER of the ROLLS.*

It is obvious, that if I were to accede to this argument, I should be reversing my own decision in *Morgan v. Morgan*, which involves the same principle. I think the only rational and reasonable mode to deal with this case is to take the words of the testator. He says the annual proceeds of the residue shall be paid to his wife for life, and after her death the said residue shall be divided between his nephews and nieces. I must ascertain what is the meaning of the word "residue," and then give the income to the wife from the death of the testator, and the capital to the nephews and nieces. I do not dispute that there may be great difficulty in  
 ascertaining

(a) 14 *Beav.* 72.  
 (b) 1 *Macq.* 243.  
 (c) *T. & R.* 241.  
 (d) *Tur. & R.* 232.  
 (e) 1 *Hare*, 161.  
 (f) 2 *Sim.* 18.

(g) 3 *Madd.* 161.  
 (h) 1 *Keen*, 410.  
 (i) 4 *Russ.* 195.  
 (k) 23 *Beav.* 512.  
 (l) *Ibid.* 469.



ascertaining what the residue consists of, and in giving the tenant for life the share which belongs to her. In *Morgan v. Morgan* (a), I stated the difficulty which arose from the different constructions which had been given to like dispositions; but I however adhere to the view I there took :—that the rule laid down in *Dimes v. Scott* (b) is that which presents the fewest difficulties and appears most consistent with common sense, and with the meaning of a testator, who says the residue shall go to one for life and afterwards to another. I must ascertain the residue and give the income from the death of the testator. That is what the Chief Clerk has found and I think correctly.

1857.  
  
 HOLGATE  
 v.  
 JENNINGS.

I must therefore refuse the motion to vary the certificate.

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Another question afterwards arose, on further consideration, upon this will, whether the perishable property ought to be converted or not, as between the tenant for life and those in remainder. In regard to this point, it should be stated, that the will finished with the following clause. “And it is my wish, upon such division of the said residue as aforesaid, after the decease of my wife *Susan Jennings*, that my said two nephews *Joseph Crew Jennings* and *Thomas Robert Jennings*, or such of them as may be then living, shall first take, as their shares, such parts of the joint property I am now holding with them, as they may think proper.”

The testator died in *January*, 1854, and *Joseph Crew Jennings*

(a) 14 *Beav.* 72.

(b) 4 *Russ.* 195.

1857.  
  
 HOLGATE  
 v.  
 JENNINGS.

*Jennings* in *March* following, but *Thomas Robert Jennings* had died in the testator's lifetime.

The Chief Clerk found as follows as to the joint property :—

“At the time of making his will, the testator was entitled, jointly with his nephews *Joseph Crew Jennings* and *Thomas Robert Jennings* (the testator being entitled to one moiety and his said nephews being entitled to the other moiety) to the property set forth in the third schedule hereto” [which were a mortgage and freehold and leasehold property].

“The testator's nephew *Thomas Robert Jennings* died on the 21st day of *March*, 1853, and from that time until and at the death of the testator, the property set forth in the said third schedule was held in equal moieties by the testator and his nephew *Joseph Crew Jennings* as tenants in common.”

Besides the leaseholds, the testator, at his death, had some long annuities which would expire in 1860.

Mr. *R. Palmer* and Mr. *Shebbeare*, for the Plaintiffs, argued, that this being a simple gift of a residue to one for life with remainder over, the leasehold and perishable property ought to be converted; *Lichfield v. Baker* (a); *Morgan v. Morgan* (b). That the special direction, at the conclusion of the will, applied to the particular property only, and was intended to confer a personal benefit on the nephews *Joseph* and *Thomas*, and to avoid the inconvenience of a sale; and that the direction as to this joint property ceased to apply upon their deaths.

*The*

(a) 2 *Beav.* 481; 13 *Beav.* 447.

(b) 14 *Beav.* 72.

bring the other

1857.

HOLGATE  
v.  
JENNINGS.

Morgan, and

expressed, that

conversion in the

the legatee for life to

in specie, and that a

know, that the law will

at its being directed by the

the omission of such a direction

to be disregarded.

to trust for conversion; that therefore  
to be regarded, though alone it would  
case. I look at the concluding words of  
which there are no means of getting over,—  
is my wish, upon such division of the said re-  
as aforesaid, after the decease of my wife Susan  
Jennings, that my said two nephews Joseph Crew Jen-  
nings and Thomas Robert Jennings, or such of them as  
may be then living, shall first take, as their shares, such  
part of the joint property I am now holding with them,  
as they may think proper.”

There were leaseholds held as joint property, there-  
fore it is obviously impossible to carry the will into  
effect unless these particular leaseholds remain uncon-  
verted (a).

I look in vain to find anything in the will to shew  
that these leaseholds were to be treated in a different  
manner from the rest of the property. The testator  
gives all the residue “of his real and personal estate,  
moneys,

(a) See *Alcock v. Soper*, 2 *Myl. & K.* 699; *Bethune v. Kennedy*, 1 *Myl. & C.* 114; *Pickering v. Pickering*, 2 *Beav.* 31, and 4 *Myl. & C.* 289.

1857.  
HOLGATE  
v.  
JENNINGS.

moneys, securities for money, and all other his effects," to trustees, in trust to pay "the annual proceeds thereof unto his wife." He does not direct them to be converted, and with respect to these particular leaseholds, he directs that they shall remain *in specie* for his nephews.

I am of opinion, upon the effect of the whole of the will, that the widow is entitled to enjoy the leaseholds and the long annuities *in specie*.

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The testator also died possessed of a number of turnpike deeds for securing different sums of money.

Mr. Lloyd asked if these ought to be got in.

*The MASTER of the ROLLS.* They are securities for money and must be got in. The rule is, the tenant for life, like the present, is entitled to retain *in specie* whatever is in the nature of an investment, but that which is merely a debt must be got in.

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1857.

## BOWN v. STENSON.

THE Plaintiff sold a public house and about twelve acres of land by auction on the 2nd of *January*, 1857, to the Defendant, for 1,325*l.*, subject to certain conditions of sale.

The conditions, so far as material, were as follows:—

5. Provided (in effect) that an abstract should be ready to be delivered to the purchaser, who should apply for the same on or after the 1st day of *February* next at the office of the vendor's solicitors, "and all objections to the title, or requisitions on the abstract (if any), shall be delivered, in writing, at the said office of the vendor's solicitors, within twenty-eight days from the 1st day of *February* next, and in this respect, time shall be considered as of the essence of the contract; and in default thereof, and as to such part of the title as such requisitions or objections (if any) shall not apply, the title shall be considered as accepted."

11. "The residue of the purchase-money shall be paid and the conveyance executed on the 25th day of *March* next, at the office of the vendor's solicitors, from which time the purchaser shall be entitled to the possession of the premises purchased; but if, from any cause whatever, the completion of the purchase shall be delayed beyond the 25th day of *March* next, the purchaser shall pay interest" until payment.

*Dec.* 4, 5, 10.

*Prima facie* taking possession, after an abstract has been delivered, and not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, and it lies on the purchaser to rebut that presumption.

A purchaser had taken possession, by his tenant and not under the contract, after an abstract had been delivered, and he had made no objection to the title till long after, when a suit was threatened, and he had promised payment of part of the purchase-money: Held, that by his conduct and on the correspondence, he had waived all objections to the title arising upon that abstract; but

The held, secondly,

that he had not waived any objection not arising on the abstract.

1857.

—  
BOWN  
v.  
STENSON.

The 13th condition provided, that the vendor should not be required to produce deeds or evidences not in his possession.

On the 25th of *February* the abstract was delivered, and on the 4th of *March* it was compared with such of the deeds as were in the vendor's possession, but no objections to the title were taken.

A tenant, to whom the purchaser had let the property, having applied to the vendor for possession, was, at the request of the purchaser, let into possession on the 7th of *April*.

The vendor's solicitors applied to the purchaser's solicitor on the 23rd of *March* and the 14th of *April* for the draft conveyance.

The following correspondence then took place between the vendor's solicitors and the purchaser's solicitor:—

*Purchaser's Solicitor to Vendor's Solicitors.*

15th *April*.

"I have not at present been able to examine all the deeds disclosed upon the face of the abstract, and am losing no time in doing so. You are, I have no doubt, fully aware of the difficulties of the case."

*Vendor's to Purchaser's.* 16th *April*.

"We are not aware of any difficulties in the case, nor can we recognize any, especially after possession has been taken."

*Vendor's to Purchaser's.* 4th *May*.

"Our instructions are to take measures to compel a completion

completion of the contract, unless the matter be at once settled. We hope you will render this unnecessary, by at once sending the draft conveyance. If you be not ready with the whole money, could you pay the vendor 300*l.* on account?"

1857.  
BOWN  
v.  
STENSON.

*Purchaser's to Vendor's.* 11th *May*.

"I think I can promise you 300*l.* by the end of this week, and to complete the purchase shortly. I hope this will be satisfactory to your client."

*Purchaser's to Vendor's.* 12th *May*.

"I am exceedingly sorry that your client has been put to any inconvenience, but I hope that all difficulties will be remedied in the course of this week, and the whole matter finally settled very speedily."

The 300*l.* was not paid, and on the 19th of *May*, the vendor's solicitors wrote that they were preparing a bill.

The purchaser's solicitor then made requisition, but the vendor's solicitors replied on the 2nd of *June* :—  
"We must distinctly inform you that we can recognise no questions of title. With a full knowledge of the facts, your client has taken possession and let the property, promised payment and done everything short of actual completion, shewing his acquiescence therein."

After further correspondence, the vendor filed a claim for specific performance, alleging that the Defendant had accepted the title. The Defendant, in his evidence, swore that he did not, by entering into possession, intend to accept the title or waive any right to make requisitions on the title, and that he did not believe that such would be the result of his entering into possession,  
and

1857.  
  
 BOWN  
 v.  
 STENSON.

and that he had never waived his rights with regard to the title.

*Mr. Lloyd and Mr. C. C. Barber for the Plaintiff.*

*Mr. R. Palmer and Mr. W. A. Clark for the Defendant.*

*The MASTER of the ROLLS reserved his judgment.*

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*The MASTER of the ROLLS.*

Dec. 10. Upon reading the evidence and documents in this case, I think that the facts prove an acceptance of the title shewn by the vendor, to this extent, that they amount to a waiver of all objections appearing upon the face of the abstract delivered to the purchaser.

The facts of the case which, in my opinion, constitute this waiver are as follows:—

The sale took place on the 2nd of *January*, 1857, subject to the conditions of sale which have been stated, the abstract was delivered on the 23rd of *February*, and was compared with the deeds in the vendor's possession on the 4th of *March*. Applications were made to the purchaser for the draft conveyance in *March* and *April*, which were not complied with, but no such answers as this was returned:—"We have not yet been able to satisfy ourselves as to the title."

Possession was given on the 7th of *April*, and it was suggested, on behalf of the Defendant, in argument, that the possession so given was immaterial, because it was according to the conditions of sale; but I am clearly of  
 opinion



opinion that this is not the true construction of the 11th condition of sale, which is, that the conveyance shall be executed on the 25th of *March*, "from which time the purchaser shall be entitled to possession of the premises purchased." There is a difference between the words "from" and "at." This makes the distinction of the time when the purchaser is to be put in possession, which is from the time of the conveyance being executed. I think that possession was not given on the 25th of *March* under the contract; not only the construction of the conditions of sale do not lead to that result, but what is of great importance, I find that it was not so treated by either side in the correspondence relative to the possession. Possession was taken by the purchaser nearly six weeks after the abstract had been delivered, and four weeks after the abstract had been compared with the deeds, not under the contract, but quite independent of the terms of it.

It is true that, although the Court will not allow a purchaser to dispute his acts which constitute an acceptance of the title shewn, by afterwards saying he did not so intend them, yet the fact of taking possession may be shewn not to have that effect. But here, the subsequent correspondence points to a wholly different result, and shews that the purchaser could not have intended it to be anything than an unconditional acceptance of the title. On the 14th of *April* the solicitors of the vendor again presses for the draft conveyance. The answer of the 15th of *April* says:—"I have not been able to examine all the deeds," but it raises no objection to the title shewn, and refers to no requisition which had not been answered. The answer of the vendor's solicitors on the 16th of *April* is important. They say, "We are not aware of any difficulties in the case,

1857.

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BOWN  
v.  
STENSON.

1857.  
  
 BOWN  
 v.  
 STENSON.

case, nor can we recognize any, after possession has been taken." Therefore giving distinct notice of the construction they put upon the act of taking possession, and stating, in effect, that it put an end of any difficulty in the case.

How is that point met by the purchaser? Does he say "you are mistaken, I did not intend, by taking possession, to waive all difficulties?" No, he makes no observation on the subject, and nothing material takes place until the 4th of *May*, when the vendor's solicitors write again for the draft conveyance, and state that their instructions are to compel a completion of the contract, unless the matter be at once settled. They add, "if you be not ready with the whole money, could you pay the vendor 300*l.* on account?" Therefore treating the matter of title as settled.

The answer of the 11th of *May* is most material. The purchaser's solicitor does not say, "I have not approved of the title, it is not made out, the requisitions have not been answered;" but the answer is this:—"I think I can promise you 300*l.* by the end of this week, and to complete the purchase shortly;" and this was two months after possession had been taken, and when the vendor's solicitors were saying, you must complete as speedily as possible, or we shall file a bill. The purchaser takes possession, and when the vendor's solicitors state that by this act all further requisitions are prevented, the purchaser, instead of saying "I did not mean it to have that effect" or of making any objection to the title, promises to pay part of the purchase-money, and it is not until pressure is put on him that he begins, for the first time, to take objections. I am of opinion that this was a waiver of all objections apparent upon the abstracts delivered, but it will not, it is true, bind him

him as to objections to the title not appearing on those abstracts. With respect to the objections there appearing, I am of opinion that he waived them, and no other defect of title is alleged or proved by the Defendant. If he had said, "I have since discovered such and such facts invalidating the title, of which the abstract contains no information," I should not compel him to complete the purchase without having these objections removed.

1857.

—  
BOWN  
v.  
STENSON.

The cases are not precisely in point, but the principles to be found in them all tend to this result. In *Burroughs v. Oakley* (a) the investigation of the title had proceeded after the alleged waiver, and the doctrine laid down in the judgment leads me to a conclusion favourable to the Plaintiff. In *The Margravine of Anspach v. Noel* (b) the taking possession was considered nothing, because it was in accordance with the contract, but the letters relied on, in that case, promising payment of the purchase-money, very much resemble the letter sent in the present instance. It is true that there was an ingredient of time, very material in that case, which does not occur in the present.

*Primâ facie*, however, taking possession after an abstract has been delivered, and not in pursuance of any provision in the conditions of sale, is a waiver of the objections appearing on that abstract, and it lies on the purchaser to rebut this presumption. This is not to be done by merely saying, at a subsequent time, "I did not so intend it;" it must be shewn that the presumption is rebutted by the fair inference to be derived from the acts of the person himself. The rule, it is to be observed, is founded on reason, because after the purchaser has taken

(a) 3 *Swanst.* 159.(b) 1 *Mad.* 310.

1857.

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BOWN  
v.  
STENSON.

taken possession of the property it may become altered, dilapidated or employed for injurious purposes. To all which the vendor can say nothing, if the property really belongs to the purchaser, which it does when he has accepted the title. Where possession is taken under the conditions of sale, before the title is shewn, if anything like waste is committed, the vendor would be entitled to an injunction to prevent it, but in the other case no injunction would be granted. The question is, not in fact as stated in argument, whether the Defendant has waived having a good title shewn to the property he has bought, but whether, an abstract of title being delivered to him, he has not waived his right of calling on the vendor to remove any objection which may appear on the face of it. If the abstract had been merely illusory, another question might have arisen, viz., whether his acts amounted to an intention to perform the contract without any title at all. But this question does not arise, because here the abstract was a *bonâ fide* deduction of title, although, no doubt, some questions might arise on the abstract which, unless waived, a purchaser would be entitled to have satisfactorily answered.

I repeat, that if the Defendant had brought forward any objection to the title not appearing in the abstract, I should not have compelled him to complete the contract till that objection had been removed, but this he has not done, and upon the facts nothing more now appearing, I am of opinion that the purchaser has accepted the title shewn on the abstract delivered to him, and that the question of title is at an end. There still remains the question of conveyance, but that is the only question. There must be a decree for specific performance, and a reference to Chambers to settle the conveyance, in case the parties differ, with the costs of the Plaintiff up to and including the hearing.

1857.

NICKOLL'S CASE.  
 RE THE COSMOPOLITAN LIFE ASSURANCE  
 COMPANY.

Dec. 12.

**M**R. *NICKOLL* was the projector of "*The Great International General Life Assurance Company*." It was provisionally registered; Mr. *Nickoll* was the registered promoter, and on the 27th of *June*, 1855, six gentlemen were returned as the provisional directors.

Provisional directors entered into an agreement to give *A. B.*, the projector, 2,500*l.* in money, and 2,500*l.* in paid-up shares. The agreement did not appear in the deed of settlement which *A. B.* had executed for 350 of those shares. Held, that the company were not bound by the agreement, and although they repudiated it, still that *A. B.* was liable unconditionally as a contributory in respect of the 350 shares.

By an agreement made between Mr. *Nickoll* and the provisional directors, dated the 11th of *July*, 1855, Mr. *Nickoll* agreed to assign to the latter all his rights in and claims (as original promoter) against the Company, and the latter agreed, in consideration thereof and of "costs, trouble and expenses incurred by *Nickoll*," to pay him 2,500*l.* out of the funds of the Company, and to allot him paid-up shares in the Company to the value of 2,500*l.*

On the 4th of *October*, 1855, a return was made of a change in the name of the Company into "*The Cosmopolitan Life Assurance Company*." It was completely registered on the 6th of *November*, 1855, and, being unsuccessful, was ordered to be wound up on the 23rd of *May* following. Neither the Company's deed nor the prospectus contained any reference to the agreement of the 11th of *July*, 1855.

Mr. *Nickoll* executed the deed for 350 shares.

In the course of winding up the Company, the official manager altogether repudiated the validity of the agree-

1857.

NICKOLL'S  
CASE.

Re

The COSMO-  
POLITAN LIFE  
ASSURANCE  
COMPANY.

ment of the 11th of *July*, and upon an application to place Mr. *Nickoll* on the list of contributories for the 350 shares, he contended—1st. That he only signed the deed of settlement in pursuance of the agreement of 11th *July*, 1855, and that he ought not to be placed on the list of contributories at all. 2nd. That if placed on the list of contributories at all, his shares should be treated as paid up, and therefore that he should not be called on to contribute, until all the other shareholders had paid up 5*l.* per share, the effect of which would be, to remove Mr. *Nickoll's* name from the list of contributories Class No. 1, and place him under Class No. 2.

The official manager's reply to these objections was—1st. That Mr. *Nickoll* executed the deed of settlement unconditionally. 2nd. That no reference to the agreement of 11th *July*, 1855, was made in the deed of settlement; and 3rd. That the agreement of 11th *July*, 1855, had never been recognised or adopted by the Company.

Mr. *Selwyn* and Mr. *Cottrell*, for Mr. *Nickoll*, argued, that if the Company repudiated the arrangement of the 11th of *July*, 1855, and refused to pay the 2,500*l.* or give "paid-up shares," they must repudiate it *in toto*; that the shares taken under it must then be restored to the Company, and *Nickoll* released from all liability in respect of them. That if he were put on the list, he would be entitled to be paid the 2,500*l.*; for a party could not be deprived of all his rights under an instrument and at the same time be held to his liability under it, for it must be treated, for all purposes, either as valid or invalid.

Mr. *R. Palmer* and Mr. *Hobhouse*, for the Official Manager, were not called on.

*The*

*The MASTER of the ROLLS.*

This is a very clear case. It is obvious that I cannot connect the agreement with the execution of the deed as against the shareholders of the Company. Here is a deed executed by Mr. *Nickoll*, by which he has become a shareholder in the Company for 350 shares. Various persons afterwards executed the deed and became shareholders on the faith of Mr. *Nickoll* being a shareholder in the Company. They trusted to his name and situation, and to his being a shareholder, which was held out to the public. It afterwards appears, that a contract was entered into, by which, in consideration of certain services (with respect to which it is not necessary to say much), he is to have 5,000*l.*, 2,500*l.* in money and the remainder in 500 paid-up shares in the Company. He says he executed the deed of the Company for 350 shares in respect of that agreement for 500 shares, and that agreement alone. It is clear, however, that the shareholders are not bound by it, and that they had nothing to do with it. If any other persons are bound or affected by that agreement, Mr. *Nickoll* must enforce his rights by some other separate proceeding of his own, if he should be advised that he has any remedy against them; but with respect to his execution of the deed, he is a shareholder like the others, and is not relieved from his liability, as regards the Company, by the agreement of the 11th of *July*, 1855.

He must be placed on the list unconditionally.

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NOTE.—See *Daniell's Case*, 23 *Beav.* 568, and 1 *De Gex & Jones*, 372.

1857.

NICKOLL'S  
CASE.

Re  
The COSMO-  
POLITAN LIFE  
ASSURANCE  
COMPANY.

1857.

## BIRON, on behalf &amp;c. v. MOUNT.

Dec. 18.

It is not, in equity, necessary that a creditor should execute a creditors' deed; if he does some act which amounts to acquiescence, he is entitled to the benefit of it. But it is not sufficient for him merely to stand by and take no part in the matter.

Creditors, who have not acceded to a creditors' deed before the debtor has taken the benefit of the Insolvent Debtors' Act, cannot, afterwards, come in and claim the benefit of it.

Held, on the construction of a creditors' deed, that the dividends which creditors would have been entitled to, if they had acceded to the deed, passed, on their default, to the debtor, and to his assignee under a subsequent insolvency.

IN 1855, *Watts*, being in pecuniary difficulties, executed a creditors' deed, and in the following year he took the benefit of the Insolvent Debtors' Act. The question was, as to the rights of creditors who had not executed or acceded to the creditors' deed before the insolvency.

The creditors' deed was dated the 26th of *February*, 1855, and was made between *Watts* of the first part, four trustees of the second part, and "the several persons whose names and seals were thereunto subscribed and set" of the third part. It recited that *Watts* was indebted to the trustees and "unto the several persons whose names and seals were thereunto subscribed and set," in the several sums opposite their names in the schedule. He then conveyed his real and personal estate to the trustees, upon trust to pay the incumbrances thereon and the costs; and in the next place, to pay or apply the said moneys in or towards payment of all such of the debts now owing by *Watts* "to the said creditors parties thereto of the third part;" such payments to be made *pari passu*; and to stand possessed of the surplus of the said trust moneys, respectively, after answering and satisfying the trusts and purposes aforesaid, in trust for *Watts*. It then provided, that any of the parties thereto should, if called upon so to do by the trustees, make a solemn declaration, under the statute,

on their default, to the debtor, and to his assignee under a subsequent insolvency.



statute, of the truth and justice of the debt claimed by them respectively, before they should be entitled to claim any dividend or benefit thereunder in respect of such debt; and in default, such person was to lose all dividends, benefit and advantage of the deed; and it should be lawful for the trustees to pay such last-mentioned dividends and the dividends of any other creditors refusing or neglecting to take the benefit of these presents, or the provisions hereby made, unto *Watts*.

1857.

*BIRCH*  
v.  
*MOUNT.*

There was a provision that the moneys standing to the credit of the trustees should, whenever the same should amount to 7,000*L.*, and at such other time as the trustees should direct, be forthwith divided equally between the several persons whose names were mentioned in the schedule thereunder written, rateably and in proportion to the amount set opposite to their respective names in the said schedule.

And it was agreed that it should be lawful for *Watts*, with the consent of the trustees, "to insert, in the schedule thereunder written, the name of any creditor or creditors of *Watts*, whose name he, *Watts*, might think ought to be inserted therein, upon the terms of such creditor or creditors executing these presents," and the person whose name was inserted was to be entitled to participate in all the advantages to be derived therefrom, *pari passu* with the other creditors of *Watts*, in the same manner and to the same extent as if he or they had been originally a party or parties thereto, so always, that any dividend or distribution then made should not be disturbed. And in consideration, &c., the several persons of the second and third parts granted *Watts* their letter of licence, and covenanted not to sue, arrest, take in execution or otherwise molest him  
or

1857.

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BIRON  
v.  
MOUNT.

or his goods, in any manner howsoever, for or in respect of their debts; and the deed provided, that if they did, *Watts* should be thenceforth discharged from their debts. The creditors also to accept the dividend in full satisfaction of their debts.

Notice was given to the creditors of the execution of this deed, and notice was advertized of the deed under the 12 & 13 *Vict.* c. 106, s. 68.

At a meeting of *Watts's* creditors, held on the 7th of *May*, 1855, it was resolved that the estate of *Watts* should be wound up without resorting to bankruptcy.

In *December*, 1855, *Page*, who had not executed the deed, sued *Watts* and obtained judgment, whereupon *Watts*, on the 18th of *December*, 1855, wrote to each of his creditors who had not already executed the deed, pressing them to execute it.

In *February*, 1855, *Watts* was arrested by *Page*. On the 6th of *March*, 1855, he petitioned for relief under the Insolvent Debtors' Act, and obtained his discharge.

In *April*, 1856, the trustees of the deed paid a dividend of 2s. in the pound to the creditors who had executed the deed. Difficulties having arisen as to the mode of executing the trust, the Plaintiff, in *June*, 1856, instituted this suit, on behalf of himself and all other the creditors of *Watts* entitled to the benefit of the creditors' deed, against the trustees, *Watts* and the provisional assignee, praying, 1st, that the trusts of the deed might be performed under the directions of the Court; 2nd, that it might be ascertained and declared what  
creditors

creditors of *Watts* were entitled to the benefit of the deed; and, 3rd, for all necessary accounts.

1857.

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BIRON  
v.  
MOUNT.

At the hearing, on the 28th of *March*, 1857, the Court directed an inquiry, what creditors of *Watts* claimed to be entitled to the benefit of the deed, besides the creditors who had already executed it, and an account of their debts. The Chief Clerk ascertained such creditors, and the amount due to them was 7,880*l.* 3*s.* 5*d.*

The cause now came on for further consideration.

Mr. *Lloyd* and Mr. *W. D. Lewis*, for the Plaintiff. The deed was only intended for the benefit of those creditors "whose names and seals were thereunto subscribed;" that is, for those who thought fit to execute it and become bound by its provisions. The creditors had full notice of the deed, from the time of its execution down to the insolvency, shortly prior to which they were invited by *Watts* to execute it. This they neglected to do, and it is therefore impossible for them to say, that they acquiesced in or assented to the provisions of the deed, or submitted to be bound by its provisions. The mere fact of signature may not be required, "but then this Court, in letting in one of a class of creditors to the benefit under such a deed as this, is bound to see that he has performed all its fair conditions;" *Field v. Donoughmore* (a).

Secondly. But it became impossible for a creditor to execute the deed or accede to its provisions after the insolvency. The qualified offer of the debtor was at an end, the deed was founded on a consideration to be given by the creditors, upon their letter of licence and  
covenant

(a) 1 *Drury & Warren*, 228, and 2 *Drury & Walsh*, 630.

1857.

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 BIRCH  
 v.  
 MOUNT.

covenant not to sue or molest the debtor or take his goods. After the insolvency it became impossible to give the consideration contemplated by this deed, which was executed for the express purpose of preventing an insolvency. A judgment has been given to the assignee in insolvency for all the debts, and this may be enforced by the assignee against the future property of the insolvent, irrespective of the wishes of any of the creditors. Those creditors, therefore, who have not chosen to give the consideration, cannot now have the benefit of the deed, when the circumstances have changed; *Lane v. Husband* (a). In *Forbes v. Limond* (b), Lord Cranworth clearly stated the law in these terms:—"I have not the least doubt of the propriety of those decisions, both in this Court and at law, several of which have been referred to, which shew that a party may bind himself by the terms of such a deed as this, even if there had not been the words 'or otherwise acceded to,' without executing it. But this, I think, is perfectly certain, that no person can be considered to have impliedly acceded to a deed of this sort, within the true meaning of that expression, who has not put himself in precisely the same situation with regard to the debtors as if he had executed it; the principle of the rule being, that if you put yourself in the situation of having the benefit of a deed you must bear its obligations, although you have not literally executed the deed."

The insolvent cannot now assent to his creditors coming in, for all his rights are now vested in his assignee.

Mr. Osborne, for Mr. Sturges, the assignee, concurred with the Plaintiff on the first point, but argued that, under the

(a) 14 Sim. 656.

(b) 4 De G., M. & G. 315.

the provisions of the deed, *Watts* was entitled to the dividends of such of his creditors as refused or neglected to take the benefit of it; that these passed by his insolvency to his assignee, and must be ascertained and paid to him, as part of the assets, for distribution amongst the creditors. He cited *Watson v. Knight* (a); *Broadbent v. Thornton* (b).

1857.

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BIRON  
v.  
MOUNT.

Mr. *Faber*, for the trustees.

Mr. *Biron*, for *Watts*.

Mr. *R. Palmer* and Mr. *A. E. Miller*, for the creditors who had not executed the deed prior to the insolvency, but who now offered to execute it and to accede to its provisions. The bill states, that the deed "was executed and attested, and notice thereof was given and published in the manner prescribed and required by the 68th section of the Bankrupt Law Consolidation Act, 1849" (12 & 13 *Vict.* c. 106, ss. 6, 8). It was therefore, by the terms of the bill, intended for the benefit of "all" the creditors. They have therefore a right to come in and take the benefit of it at any time. In *Nicholson v. Tutin* (c), fifteen years had elapsed, and yet the creditors were held entitled to come in. Unless they have actually refused to come in under and assent to the deed, as in *Johnson v. Kershaw* (d), they may now insist on the benefit of it. Here the creditors have received notice of the deed and have done nothing inconsistent with it; they have rested satisfied with its provisions, and have refrained from pursuing their legal remedies, and thus, in truth, they have assented to it. Even at law, this is a binding declaration of trust in their

(a) 19 *Beav.* 369.

(b) 4 *De Gex & S.* 65.

(c) 2 *Kay & J.* 18.

(d) 1 *De Gex & S.* 264.

1857. *their favour; Harland v. Binks(a); Siggers v. Evans(b);*  
 and the communication to the creditors renders the deed  
 irrevocable as a trust deed; *Acton v. Woodgate(c); Bill*  
*v. Cureton(d).*

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 BROWN  
 v.  
 MOUNT.

It is not necessary to go through the formality of signing the deed; assent to it is sufficient: *Spottiswoode v. Stockdale(e); Jolly v. Wallis(f); Field v. Lord Donoughmore(g)*, where Lord *St. Leonards* says, "But it is not absolutely necessary that the creditor should execute the deed; if he had assented to it, if he had acquiesced in it, or acted under its provisions, and complied with its terms, and the other side expressed no dissatisfaction, the settled law of the Court is, that he is entitled to its benefits. The mere fact of his signature is not actually required."

*Watts* was to have a right to insert the name of any creditor he might think fit in the schedule, and if any refused to take the benefit of the deed, his dividend was not to enure to those who had executed it, but to go to *Watts*. This portion, at all events, passed to the assignee, and is distributable amongst the other creditors.

#### *The MASTER of the ROLLS.*

I entertain no doubt, that the creditors who did not come in before the insolvency are not now entitled to execute the deed, except those who had previously taken some active step to express their acquiescence in it.

The

(a) 15 Q. B. Rep. 713.  
 (b) 5 Ellis & B. 367.  
 (c) 2 Myl. & K. 492.  
 (d) *Ibid.* 503.

(e) *Cooper*, 102.  
 (f) 3 *Exp.* 228.  
 (g) 1 *Drury & Warren*, 227.

The cases which have been cited appear to me to be all perfectly consistent. *Harland v. Binks* (a), and *Siggers v. Evans* (b), do not, in the slightest degree, affect the question which is now before me. In those cases, the point was, whether the deed was valid as against an execution creditor; that is to say, whether it was revocable, at pleasure, by the debtor who had executed it. But in this case, there can be no question that the deed is perfectly good, and that has not been disputed; it was executed for the benefit of all the creditors of *Watts*, and the only question is, which of them are entitled to the benefit of it, and down to what time will the creditors, who accede to the deed, be entitled to claim the benefit of it.

1857.

  
 BIRON  
 v.  
 MOUNT.

The principle is very well laid down by Lord *St. Leonards* in *Field v. Lord Donoughmore* (c), where he states, that "It is not absolutely necessary that the creditor should execute the deed; if he has assented to it, if he has acquiesced in it, or acted under its provisions, and complied with its terms, and the other side express no dissatisfaction, the settled law of the Court is, that he is entitled to its benefits."

About that I entertain no doubt; but I apprehend he must for this purpose do some act which amounts to acquiescence. It is not sufficient for him merely to stand by and take no part at all in the matter: it is true, that in some cases, as is said in the case of *Nicholson v. Tutin* (d), something may be inferred from his standing by until he has lost a remedy which he might have had at law, if he had not come in under the deed. But no such question arises here. In my opinion he

must

(a) 15 Q. B. Rep. 713.

(b) 3 Ellis &amp; B. 367.

(c) 1 Dru. &amp; W. 227.

(d) 2 Kay &amp; J. 23.

1857.

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BIRCH  
v.  
MOUNT.

must do some act; but in this case, can the Court treat a creditor as having acquiesced in the deed, unless it be prepared to say, that if he took any proceeding inconsistent with the provisions of the deed, it would, at the instance of *Watts*, stop the proceeding, on the ground that it would not allow a creditor to play fast and loose, and say, "I will take under the deed, if it proves to be for my advantage, but otherwise I will repudiate it." Assume that there had been no insolvency, and that the creditors, represented by Mr. *R. Palmer*, were now suing *Watts* at law, upon what ground and upon what fact now before me, could I restrain them from proceeding in their action? They now say they have acquiesced in the deed; but what act of acquiescence is there? If, as has been held in several cases, a verbal assent is sufficient, in this case there is no evidence of any such assent.

If this be so, the only question is, up to what time are they entitled to come in under the deed? I admit, that as long as they have done no act inconsistent with the deed, and so long as the relation between the parties remains unchanged, they may come in under the deed; and accordingly, if there had been no insolvency, there would have been nothing to prevent these creditors from coming in under this deed now, any more than there would have been in the case of *Nicholson v. Tutin* (a), which case was remarkable, because although a very considerable time, fifteen years, had elapsed since the date of the deed, the Plaintiff had actually executed it with the assent and permission of the assignor, in his lifetime, shewing consequently that the deed was an existing deed at that time, and that it was to be so treated.

Assuming,

(a) 2 Kay & J. 18.



Assuming, then, that creditors would be entitled to come in, at any time while the relation of the parties remains unchanged, the question here is, whether they are entitled to come in when the relation between the parties has become altered? It is obvious they could not come in after all the assets had been divided; for they could not disturb any proceedings that had taken place. The question, and the only one in this case is, whether this was a contract between *Watts* and all the creditors who came in under the deed, of which *Watts* was entitled to the benefit, or simply a trust for the benefit of all the creditors? If it was a trust for their benefit, and nothing more was to be done, then, undoubtedly, they would be entitled to the benefit of the trust, because they would be *cestuis que trust*. But, in point of fact, the deed is only a trust deed for the benefit of such persons as should come in under it and become liable to its provisions, and to the covenants entered into on the part of the persons executing it, and they must do that in order to constitute themselves *cestuis que trust*, and they do not become such until they are bound by the covenants contained in the deed. Then, are they able to put themselves in that situation now? It is obvious they are not, for they cannot give *Watts* the benefit which he contracted for, because the insolvency has superseded it. The object of the deed was to prevent bankruptcy and insolvency, and all the creditors who have done what they could to prevent such a result, either by executing the deed or by acquiescing in it, are entitled to the benefit of it. But an insolvency having taken place, those creditors who have lain by till that event has occurred are not, in my opinion, entitled to the benefit of the deed. I must, however, hear Mr. *Lloyd* upon the other point.

1857.

BRON  
v.  
MOUNT.

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Mr.

1857.

BIRON

v.

MOUNT.

Mr. *Lloyd*, in reply, as to the construction of the deed, argued, that the direction in the former part of the deed, to pay the residue (after paying the creditors, parties to the deed, their debts in full), and the 7,000*l.* clause, were quite inconsistent with a retainer of the dividends of "creditors refusing or neglecting to take the benefit of the indenture." That, therefore, *Watts* and his assignees and the other creditors took no part, until the parties to the deed had been fully paid.

*The MASTER of the ROLLS.*

I concur entirely in the principle stated by Mr. *Lloyd*, that the Court, in construing instruments, must make all its parts cohere together, and that the last thing the Court will do is to strike out any part of a deed. If there are two parts of a deed which are positively inconsistent with each other, then the Court is compelled to act upon one, and there is a technical rule determining which of the two shall prevail; but if the Court can make them correspond and agree together, it is bound to do so. Here it is impossible to have words which are more precise than these, which are: that in case the parties to the deed shall refuse to make the statutory declaration required, they shall lose all their dividends, and that "it shall be lawful for the trustees to pay such last-mentioned dividends"—if the deed went on "to the said *Edward Watts*" there would be an end of the question)—"and the dividends of any other creditors refusing or neglecting to take the benefit of these presents, or the provisions hereby made, unto the said *Edward Watts*."

There are two classes of dividends spoken of:—the dividends of persons who are named in the schedule and who refuse to make the declaration required, and the dividends

dividends of persons who "refuse or neglect" to take the benefit of this deed. Then I must strike these latter words out of the deed, unless I say, that in the case of creditors not executing the deed, there must be a dividend set apart for them, and paid to *Edward Watts*.

1857.

*BIRON*  
v.  
*MOUNT.*

What are the other parts of the deed which are said to be inconsistent with it? There really is no other part of the deed which is not perfectly consistent with it, with this single exception, that there is one clause in the deed which says, "as soon as the 7,000*l.* are in the possession of the bankers, at any time, the trustees, at their discretion, shall divide the same amongst the persons whose names are mentioned in the schedule." I observe that is not to be taken absolutely and literally, because the persons mentioned in the schedule who have not made the declaration required would not be entitled to receive the dividend. This, therefore, does make some qualification of this clause necessary, and as that clause must be qualified to some extent, it is to be further qualified to meet this further provision, which clearly and distinctly directs that the dividends of creditors who do not execute the deed are to be paid to *Edward Watts*, and he having become insolvent, it is clear that his provisional assignee is entitled to the benefit of that clause.

I will make a declaration, if required, that the creditors, who did not act to assent prior to the insolvency, are excluded from all benefit under the deed, and that the dividends which would have belonged to the creditors who have refused or neglected to take the benefit of the deed are to be paid to *Watts's* assignee.

1857.

Dec. 15, 16,  
17.1858.  
Jun. 20.

## WILLIAMS v. PAGE.

The managing committee of a projected railway company are, as well as the directors after its formation, not the mere agents of the shareholders, but their trustees, and are liable to account as such.

When the managing committee of an abortive company have rendered their accounts, and divided the money in their hands, without comment or remonstrance on the part of the shareholders, the Court would not, three or four years afterwards, decree an account against them.

THIS bill was filed in *June*, 1853, by *Williams* and *Lennard*, "on behalf of themselves and all other the holders of scrip and shares in the company called *The Midland and Eastern Counties Railway Company*, except such of the Defendants as may be holders of such scrip or shares." The facts of the case were as follows :—

In *July*, 1845, a project was set on foot for the formation of a railway from *Cambridge* to *Northampton* and *Worcester*, to be called *The Midland and Eastern Counties Railway Company*. Prospectuses were issued and a provisional committee of management was formed; 18,160 shares of 25*l.* each were taken, and deposits of two guineas and a half were paid, amounting to 47,670*l.* In consequence of the small number of shares taken, half the project was abandoned, and application was made to Parliament for authority to construct the line from *Cambridge* to *Weedon* only. The bill passed the House of Commons without opposition. Various meetings

Provisional directors professed to the shareholders that they had themselves taken 3,800 additional shares, and paid the deposit, in order to provide the deposit required by the Standing Orders. The money was advanced by eleven of the provisional committeemen and three others. The project failed, and the money was returned in full to the persons who had advanced it. Held, that this was a fraud on the company, and that the money must be restored; but held also, that the relief could not be had in the absence of the three.

A Plaintiff is not justified in adding persons as Defendants to a suit, merely because the original Defendant insists, by his answer, that they are necessary parties. Persons so added, having been dismissed, the Plaintiff was ordered to pay the costs.

Observations on barratry and suits instigated by attornies for their own purposes.

ings of scripholders were held, for the purpose of considering whether the project should be abandoned altogether, at which a sufficient number of shareholders were not present, and finally a fourth meeting was held in *June*, 1846, when the company was sufficiently represented by the shareholders present, and had before them a report of some gentlemen, who had been constituted a committee to investigate the affairs of the company, and which report had previously been circulated amongst the shareholders. At this meeting, it was resolved to prosecute the undertaking, and apply to the House of Lords, for the purpose of obtaining their sanction to the proposed bill. The principal and indeed the only materials before the proprietors, for the purpose of guiding them in this matter, was the report of the investigation committee. This stated, that in order to provide compliance with the Standing Orders of the House of Lords, an additional sum of money was required beyond the money that had been subscribed; that this could be obtained by the subscriptions of fourteen persons, (eleven of whom were members of the committee of management,) who had, amongst them, for this purpose, taken 3,800 additional shares, and paid the deposit of two guineas and a half per share, which would enable them to comply with the Standing Orders of the House of Lords.

The report accordingly stated the funds of the company to be as follows:—In the name of the Accountant-General, 30,000*l.*; balance on *Glynn & Co.*, the bankers of the company, 4,197*l.* 16*s.* 9*d.*; subscriptions by members of the committee of management, 9,975*l.*, making a total of 44,172*l.* 16*s.* 9*d.*, against which was to be put the expenses already incurred, amounting to 18,325*l.* 17*s.* 5*d.*, leaving a balance of 25,846*l.* 19*s.* 4*d.*

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Accordingly,

1857.

WILLIAMS  
v.  
PAGE.

1857.  
WILLIAMS  
v.  
PAGE.

Accordingly, on the faith of the statement so made, the shareholders resolved not to abandon the project, but to endeavour to pass the bill through the House of Lords. In that House, they met with opposition, the bill was thrown out and the project abandoned. There then remained nothing more to be done but to explain to the shareholders how this fund had been employed, and to distribute any balance that might remain unexhausted.

The managing committee had not, however, rendered any formal accounts to any of the shareholders, but had made a payment of 10s. per share to such of the shareholders as were willing to accept it; and they had, according to the statement made by them in the answer and the entries contained in their books, disposed of the sums they had received in payment of the expenses incurred by them for the purposes of the undertaking, and in repayment of the 9,975*l.* lent by the bankers for the purpose of enabling them to comply with the Standing Orders of the House of Lords. This sum of 9,975*l.* was that already referred to, as consisting of the deposits on the shares taken by the fourteen persons, of whom eleven were members of the managing committee. This sum, it was admitted, had not been treated as assets of the company, but had been repaid to the persons who advanced it. Seven years afterwards, in *June*, 1853, this bill was filed, which prayed:—

1. That an account might be taken of all the costs, expenses and disbursements properly incurred or made by the Defendants, in and about the formation of the company, and of all sums received by them by way of deposit on the shares of the company.

2. And that the surplus of such deposits, after deducting

ducting such costs, &c., might "be secured or paid in such manner as this Court should direct, for the benefit of the Plaintiffs and the other persons on whose behalf they sued."

1857.  
  
 WILLIAMS  
 v.  
 PAGE.

It appeared that of the two Plaintiffs, *Williams* had received back the 10s. per share, while *Lennard* had received nothing.

Another circumstance much relied on, in argument, was this:—that the interest of the Plaintiffs was very small, and that this was a suit instituted for the benefit of the solicitor only, who had been previously concerned in the same matter for the Plaintiffs in *Apperly v. Page (a)*, which had produced no good result to the Plaintiffs, and had been dismissed.

Besides this, great delay had taken place in the prosecution of the suit, and as against two of the Defendants, *Dubbs* and *Raworth*, the bill had been dismissed for want of prosecution (*b*); but the Court concluded, from the evidence, that they had not acted throughout as members of the provisional committee, and had not made or sanctioned the retention and payment of the 9,975*l.*


The cause now came on for hearing.

Mr. *R. Palmer*, Mr. *J. H. Palmer* and Mr. *H. Smith*, for the Plaintiffs, argued that the Defendants were trustees, and were liable to account, in this Court, to the Plaintiffs and the other persons on whose behalf they sued, for the moneys they had received, and for the 9,975*l.* improperly repaid.

They

(*a*) 1 *Phillips*, 779.

(*b*) *Ante*, p. 490.

1857.  
  
 WILLIAMS  
 v.  
 PAGE.

They argued that the objections raised to the pleadings by the Defendants were illfounded, and referred to *Clements v. Bowes* (a); *Preston v. The Grand Collier Dock Company* (b); *Holt's Case* (c); *Apperly v. Page* (d); *Parsons v. Spooner* (e); *The Charitable Corporation v. Sutton* (f).

Mr. *Lloyd* and Mr. *Speed*, for the Defendant *Page* and the other principal Defendants. First. The Plaintiffs are barred by their laches and the lapse of time, the undertaking was abandoned in 1846, the bill was not filed until 1853, and the relief is now asked in 1857; *Stupart v. Arrowsmith* (g); *Williams v. Salmond* (h). The provisional committee of an abortive company are not trustees, but mere agents, employed on behalf of other persons to establish the company, and when the scheme fails and is abandoned, the subscribers have a legal remedy, by action at law, to recover back their deposits; *Walstab v. Spottiswoode* (i); and as an action can be maintained, the Statute of Limitations applies equally to this as to all other cases of principal and agent.

Secondly. This is a suit to wind up a partnership, and every partner is a necessary party; *Evans v. Stokes* (k); for in such a case one partner cannot sue on behalf of others. If the accounts have not been settled, they must now be taken, and all those who have been paid must bring back what they have received, which cannot be ordered unless they are parties. This objection is not one of a misjoinder, as in *Clements v. Bowes* (l), where the

(a) 1 *Drew.* 684.

(b) 11 *Sim.* 327.

(c) 1 *Sim. N. S.* 389.

(d) 1 *Phillips*, 779.

(e) 5 *Hare*, 102.

(f) 2 *Atk.* 400.

(g) 3 *Smale & G.* 176.

(h) 2 *Kay & J.* 463.

(i) 15 *Meer. & W.* 501.

(k) 1 *Kern*, 24.

(l) 1 *Drew.* 694.



the Court was able to assist the Plaintiffs under the 15 & 16 *Vict.* c. 86, s. 49, but one where all the necessary persons are not before the Court.

1857.  
  
 WILLIAMS  
 v.  
 PAGE.

Thirdly. There is a misjoinder of Plaintiffs. Not only are the interests of the Plaintiff and of the other shareholders, on whose behalf the two Plaintiffs profess to sue, conflicting, for some have received back their deposits and given up their scrip, and others have received 10s. a share in full of all demands, but the interests of the two Plaintiffs themselves are adverse, *Williams* having received back 10s. a share and *Lennard* nothing, so that one is accountable to the other.

Fourthly. *Raworth* and *Dabbs* have been dismissed from the suit. They are necessary parties to it, and it cannot proceed in their absence, for all persons implicated in a breach of trust must be before the Court in a suit to obtain redress respecting it. The case of *Walker v. Symonds* (a), explained by *Munch v. Cockerell* (b), shews this; and if *Raworth* and *Dabbs* have received back their share of the 9,975*l.* they must account for it, and the Plaintiffs cannot represent them. The case does not come within the 32nd General Order of *August*, 1841 (c), relating to parties jointly and severally liable; *Shipton v. Rawlins* (d); *Biggs v. Penn* (e). The Plaintiffs, having thought fit to frame their record so as to make *Dabbs* and *Raworth* accountable, cannot, at the hearing, waive that relief; *Fussell v. Elwin* (f); *The London Gas Light Company v. Spottiswoode* (g). *Dabbs* and *Raworth* cannot by any process be brought back to the suit, which has been dismissed against them  
 for

(a) 3 *Swan*. 75.

(b) 8 *Sim.* 231.


(c) *Ordines Can.* 174.

(d) 4 *Hare*, 619.

(e) 4 *Hare*, 469.

(f) 7 *Hare*, 29.

(g) 14 *Beav.* 264.

1857.  
  
 WILLIAMS  
 v.  
 PAGE.

for want of prosecution; *Lautour v. Holcombe* (a); and as they are indispensable parties the bill must be dismissed altogether; *Dixon v. Gayfere* (No. 1) (b).

There is only one person desirous of having the account taken, and the real object of the Plaintiffs is, not to have an account taken, but to get a decree like that in *Apperly v. Page*, which was ultimately dismissed without costs.

Mr. Selwyn, Mr. Freeling, Mr. Osborne, Mr. Follett, Mr. Roxburgh, Mr. Elderton, Mr. Bagshawe, Mr. J. H. Humphreys, Mr. Jessel, Mr. Osler, Mr. Villiers, for the Defendants. *Maitland's Case* (c); *Bright v. Hutton* (d); *Macbride v. Lindsay* (e) were referred to.

Mr. R. Palmer, in reply:—*Harrison v. Brown* (f); *Besly's Case* (g).

*The MASTER of the ROLLS* reserved judgment.

*The MASTER of the ROLLS.*

1858.  
 Jun. 20.

This is a bill filed by two shareholders in an abortive company, on behalf of themselves and all the shareholders of the company other than the Defendants, praying, as against the directors or managing committee of the company, an account of their receipts and disbursements in that character. The Defendants dispute the Plaintiffs' right to that account under any circumstances.

(a) 11 *Sim.* 71.

(b) 17 *Brav.* 44.

(c) 4 *De G., M. & G.* 777.

(d) 3 *H. Lds. Ca.* 341.

(e) 9 *Hare*, 574.

(f) 5 *De G. & Sm.* 728.


(g) 3 *De G. & Sm.* 224.

cumstances. If they fail in that, then they contend that the time that has elapsed is a bar to any relief to be afforded in this suit. If they fail in that also, then they allege that the constitution of the suit and the absence of material parties are insuperable obstacles in the way of the Plaintiffs' demand.—[*His Honor stated shortly the facts of the case.*]

1858.  
  
 WILLIAMS  
 v.  
 PAGE.

I will first consider the question which arises as against the Defendants who were avowedly members of the managing committee, and who have already sanctioned and now defend the transaction in question. If no case can be made out against them, it will be unnecessary to consider the case of the other Defendants. But if it should appear, that the Plaintiff is entitled to relief against any of these Defendants, it will be necessary to consider the case of the other Defendants individually, as, in many respects, points of difference arise between them.

With regard to the first class of Defendants, regarding the case solely on the merits, and apart from any objections which may arise from the constitution of the suit or the lapse of time, I have not, from the commencement of this case, as soon as I had learned the facts, entertained the slightest doubt. The managing committee of a projected railway company are, as well as the directors of the company after its formation, not the mere agents of the shareholders, but their trustees, and liable to account as such. The trust, no doubt, is a peculiar one ; but, such as it is, they have undertaken to discharge the duties of it, and they must be responsible for the due performance of them. In my opinion, all principle and all authority point one way on this subject, and I should consider myself wasting public time by enunciating and enforcing elementary principles

1858.  
  
 WILLIAMS  
 v.  
 PAGE.

principles which are familiar to every one cognizant of legal matters, if I were to enlarge upon this subject. Still the nature of the trust is such, that I should consider time, although not a bar by statute, a very material ingredient in such a transaction, and having regard to the discretion which Courts of Equity have always exercised upon this subject, and which, in fact, forms an important branch of equity itself, I should think, that a Court of Equity would refuse relief to shareholders and decline to decree such general account against persons so situated, who had three or four years before rendered their accounts, divided the money in their hands, and this without meeting with any comment or remonstrance on the part of the shareholders. They might well suppose that they had got rid of the whole matter, and have lost or failed to preserve vouchers and evidence on the subject of their account. In such cases, all that is most favourable ought to be presumed in their favour; but, on the other hand, if, in the account rendered by them, there be any concealment of a material item, or if they suppress an important circumstance affecting that account, it would be difficult to say, that three or four, or even more years of acquiescence in an account so rendered would bind the shareholders.

Here, if there was no concealment there was no publicity, since no statement of accounts to justify the payment of no more than 10*s.* per share was made to any of the shareholders, and the books, if open to their inspection (which I think was the fact on the evidence before me) were not so in all cases without difficulty, and in the case of the Plaintiff *Lennard*, application made by him personally for that purpose was refused. In addition to this, a suit, substantially for the same purpose, was filed in *July*, 1846, which was not disposed

posed of till *February*, 1851, two years and a half before this bill was filed.

1858.

WILLIAMS  
v.  
PAGE.

In this state of circumstances, I cannot think that time alone can constitute any bar to the Plaintiffs' right to an account, however justly it might do so in a case where the accounts had been rendered, inspected, not objected to, and no error or defect subsequently assigned in respect of them. Such certainly is not the case before me. Not only had no accounts been rendered before the institution of the suit, but now it appears, on the examination of them, that a sum exceeding 9,975*l.* has not been duly accounted for. This sum had been advanced as a deposit money on shares taken by fourteen shareholders, in order to comply with the Standing Orders of the House of Lords, and it had, in contemplation of the resolution of the shareholders to proceed with the project, been set apart as forming a part of the assets of the company in the report of *June*, 1846, on the faith of which the shareholders determined to proceed with the bill. By the accounts it now appears that this very sum has not, in fact, been treated like the other assets of the company, but that it has been repaid in full to the fourteen shareholders who subscribed for these additional shares, or to the persons who had supplied them with the money for that purpose. It did not require the high authority of Sir *Richard Kindersley* in the case of *Clement v. Bowes* (a), to establish, that this is a proceeding which can never meet with any sanction from a Court of Equity. To hold that the holders of these additional shares were entitled to be re-paid, in full, the deposits paid in respect of them, would be to sanction a direct breach of trust, and an act of gross partiality, unless all the other shareholders

(a) 1 *Drew.* 684.

1858.  
  
 WILLIAMS  
 v.  
 PAGE.

shareholders are also to be paid in full the deposits advanced by them. To treat it as a colourable subscription, or a nominal taking of shares, and that the money was advanced as a mere loan, in order to comply with the exigencies of the Standing Orders of the House of Lords, would be to lay down, that a direct and positive fraud on the House of Lords would be countenanced, upheld and treated as valid in this Court. Besides which, and in addition to the fraud on the Legislature, a direct fraud would be thereby perpetrated upon the other shareholders, who were ignorant that this was intended to be a mere loan, and who were assured by the report, that if they proceeded, this sum would be treated as part of the assets of the company; and it should be observed, that this remark, as to the deception practised on the other shareholders, applies not only to those who attended the meeting of *June*, 1846, but also to all those who abstained from attending it, who may fairly be presumed to have stayed away, in consequence of their acquiescence in the resolution, which it was probable that the shareholders would adopt after reading the report which had been circulated amongst them.

I am therefore unable to regard this transaction in any other light than that the managing committee have thought fit, with respect to certain shares belonging to certain shareholders, to treat them in a different way from the shares of other shareholders similarly situated, and that they have repaid one class the full amount of their deposits, whilst to the other they have only returned one-fifth part of their deposits; and what makes the transaction the worse is, that the shareholders so favoured are, for the most part, (namely, eleven-fourteenths,) themselves. It is, in every part, a transaction which, in my opinion, does not bear stating in a Court of Equity, and which this Court cannot fail  
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to strive to repress and redress by all the means in its power. So far, therefore, as the merits are concerned, the Plaintiffs are entitled to relief, and time offers no bar to their title.

1858.  
WILLIAMS  
v.  
PAGE.

I now come to consider the objections to the suit, which I have referred to and which do not consist in the merits of the case.

The first is not put so much as an objection to the suit, as it is brought forward as a reason why the Court should be astute and vigilant to discover any technical reason to defeat it, inasmuch as the suit is not substantially brought by the Plaintiffs for relief, but is instituted for costs by persons other than the Plaintiffs, and which persons have already shewn their disposition to this effect in the suit of *Apperly v. Page*, which was for the very same matter, and which was stopped by a compromise in 1851; and accordingly the conduct of the solicitors in that suit, who are the solicitors of the Plaintiff in this, is referred to in corroboration of this statement.

It is then strongly and properly urged, that this Court is bound to protect strangers against the injury arising from the stirring up of quarrels and law suits, and that it ought to repress every tendency to that offence, which is called, in legal language, *barratry*, and which has been so discountenanced in this country from all time, that the earliest statutes inflict penalties upon persons found guilty of it. I cannot but admit, that on hearing the evidence respecting what occurred in the suit of *Apperly v. Page*, and the cross-examination of both the Plaintiffs in this case, I think it highly probable that this suit has been, in a great measure, instituted, and possibly been instigated by, the Plaintiffs' attorney;

1858.  
WILLIAMS  
v.  
PAGE.

attorney; but I have not, in consequence of having come to this conclusion, considered myself entitled to view this case in any different manner than that in which I should have to regard it, had I come to an opposite conclusion. It is extremely difficult to draw the proper boundary between advice, encouragement and instigation of a client to institute a suit, and all these may proceed from an earnest desire to redress the wrongs suffered by a poor and uninfluential person. If the suit were substantially that of the attorney, and the client can neither gain nor lose by it, a very different state of considerations would arise, but upon the evidence this is not the case. Neither can the Court properly weigh the evidence with reference to any knowledge it may possess of the character of the actions derived from other suits. It is, I apprehend, the province of a Court of Justice to hold its hand evenly between all persons. It may be difficult, no doubt, when the case arises, not to feel influenced by the reflection that the Court is giving property to one who has already a superabundance of it, and taking it away from one who can ill afford to spare a penny; that it is making a decree in favour of a person of bad character, and against one of the most unimpeachable reputation; but it is the duty of the Court to shut its eyes to all circumstances, other than those which belong to and are established in the case before it, and it was a wise provision of our ancestors, which, among the advantages by various circuits of Judges, prevented, as much as possible, the cause of an innocent suitor from suffering from the prejudice that might attach from his having unwittingly employed, as his attorney, a man who had usually been found to conduct discreditable cases. When the Court is unavoidably possessed of the knowledge which results from such experience, it becomes doubly its duty to watch the feeling which arises, and  
to



to prevent itself from being led away by what appears to be the impulse of an honest zeal, but what, in truth, may really be only the bias of prejudice, and extend to a denial of justice. The case which the Court has to determine is, the cause of the Plaintiff and the Defendant; their right must depend on the facts alleged and proved before the Court; it ought not to depend upon any extraneous circumstances, which, in the opinion of the Court, justly or unjustly, may attach to their legal advisers. On the evidence before me, I am satisfied that this is a suit in which the Plaintiffs will be liable, if they fail, to pay what will be decreed against them, and that they will receive what, if anything, they shall be found entitled to. It is true the amount in question, so far as regards the Plaintiffs, is extremely small, so much so, that, as far as I can estimate, it will not exceed the sum of 22*l.* 10*s.* in favour of either; but if, on such a ground as that, I were to allow the Defendants to keep upwards of 9,000*l.*, which they have improperly retained or paid to themselves, I should be endeavouring to establish the doctrine, that provided the amount taken was small, although the number of victims was great, the perpetrators of the fraud would remain secure in any Court of Equity, but such a decree would never be followed, even if it were allowed to remain unreversed.

I come now to consider the circumstances arising from the construction of the suit, on which the Defendants rely. The objections taken by them may be stated thus:—First, that the bill is defective by reason of the absence of the Defendants *Dabbs* and *Raworth*, two of the original Defendants on the record, against whom the bill has been dismissed. Secondly, that there has been a misjoinder of the Plaintiffs, for that the Plaintiff *Williams* has received 10*s.* *per share*, and that therefore he cannot complain of that transaction,

or

1858.

WILLIAMS  
v.  
PAGE.

1858.  
  
 WILLIAMS  
 v.  
 PAGE.

or dispute the propriety of that payment as in full of all claims against the provisional directors. Thirdly, that this being a suit instituted, practically, to contest the propriety of the repayment of the 9,975*l.* in full to the fourteen shareholders who took the 3,800 additional shares, it is a bill by some of the shareholders on behalf of themselves and all the shareholders other than the Defendants; that of the fourteen shareholders who subscribed the 3,800 additional shares, eleven only are represented on this record; that the remaining three must therefore be treated as Plaintiffs, and that this therefore is a bill by three amongst other Plaintiffs, who ask that the transaction by which they get paid in full may be annulled; and that, consequently, they ought to be made Defendants, as having an interest adverse to that of the other Plaintiffs. I will consider these objections *seriatim*.

In support of the first, it is urged, that, although the Plaintiff might possibly have sustained this suit without making *Dabbs* and *Raworth* parties, yet that, having elected so to do, they must keep them or their representatives on the record, upon the principles that I followed in the case of the *London Gas-Light Company v. Spottiswoode* (a), namely, that if a Plaintiff elects to proceed against all the trustees, he cannot afterwards waive his relief as regards one or more, and proceed solely against the remainder. In truth, however, this principle has, in my opinion, no application to the present case. Assuming that Mr. *Dabbs* and Mr. *Raworth* had acted throughout as members of the provisional committee, and that they had made or sanctioned the repayment of the 9,975*l.* in question, the argument would be well founded and the objection valid; but if, as in my opinion appears

(a) 14 *Beav.* 264.

appears to be the case on the evidence, these Defendants did not so act, and consequently their interest be rather with the Plaintiffs than the Defendants, and no liability to account exist as against them, then I think that the bill was properly dismissed as against them by the Plaintiffs, and that the other Defendants cannot complain of this having been done. Accordingly, Mr. *Lloyd* very logically, in the view I take of this objection, endeavoured to support it and to contest the propriety of their dismissal, on the ground that their liability to account, as provisional directors, could not now be disputed, inasmuch as the bill had alleged that liability to account; that the bill was verified by affidavit; that the facts so alleged and verified had been admitted to be true by the Defendants, other than the two in question; and that, therefore, it was not competent to the Plaintiffs now to allege the contrary. But I do not think that, by reason of these circumstances alleged as against Mr. *Lloyd's* clients, in a matter not expressly put in issue between them and the Plaintiffs, those Defendants are entitled to say that the Plaintiffs are estopped from relying on the facts as they appear in evidence, as to that matter which is in issue between the Plaintiffs and the other Defendants; and the more especially as this argument is not used for the purpose of giving Mr. *Lloyd's* clients any right against those other Defendants, but for the purpose of supporting a technical objection to the relief to which the Plaintiffs would otherwise be entitled.

The second objection, as to the misjoinder of the Plaintiffs, is answered by the case of *Clement v. Bowes* (a), and the decision of Vice-Chancellor *Kindersley* in that case. In truth that case is an authority to

(a) 1 *Drew.* 684.

1858.  
  
 WILLIAMS  
 v.  
 PAGE.

to bind me on the present occasion, and in which also I fully concur. Neither is it, in my opinion, affected or weakened by the decision of Vice-Chancellor *Wood* in the case of *Williams v. Salmond (a)*, to which I will also refer.

*Clement v. Bowes* was a suit instituted by one of the share or scripolders of the *Hull and Lincoln Railway Company*, on behalf of himself and all the other shareholders other than the Defendants, against the finance committee, praying an account of their receipts and payments on behalf of the company. The bill stated the promotion of the scheme and its registration; that there were 2,500 shares of 20*l.* each, and a deposit of two guineas *per share*; that the Plaintiff took and paid deposits on 500 shares. On the 4th of *February*, 1846, 26,250*l.* was deposited with the Accountant-General, in conformity with the Standing Orders of the House. The bill was thrown out and the project abandoned. The finance committee managed all the affairs of the company, sent an account to each shareholder and offered to return the 17*s.* 6*d.* per share. The Defendants, in their answer, accounted for the whole of the deposits, with the exception of thirteen sums of 210*l.* each, which they said were a loan by thirteen shareholders, made for the purpose of complying with the Standing Orders of the House of Commons, and which were in consequence repaid in full. The Vice-Chancellor held, that these sums must be treated as assets of the company, to be distributed *pro rata* with the other funds, and that the thirteen shareholders were not entitled to receive these payments back in full. He held, first, that the circumstance that the Plaintiff might have applied under the Winding-up Acts was no objection to that suit.

Secondly.

(a) 2 *Kay & J.* 463.

Secondly. That the 49th section of the 15 & 16 Vict. c. 86, removed any defect that might have remained with respect to misjoinder. Thirdly. That the persons comprising the committee of management were not necessary parties to that suit. And, fourthly, That the fact that the 17s. 6d. had been paid and received on behalf of their shares by many of the shareholders did not give them an adverse interest to the rest of the shareholders; and he made a decree for an account, declaring that the Defendants were entitled to credit for 17s. 6d. per share paid by them.

1858.

WILLIAMS  
v.  
PAGE.

That case bears a striking affinity to the suit before me, with this exception, that the third objection for want of parties, which, as I understand the case, did not arise in that suit. That decision, which is in strict accordance with the principles of equity administered in this Court, is not intended to be disputed by Vice-Chancellor *Wood* in the case of *Williams v. Salmond*, and is not, in my opinion, affected by it. *Williams v. Salmond* was very peculiar in its circumstances. It is reported only on the question of parties, on which alone the reasons of the judgment are given; but the Vice-Chancellor expressly states that, in his opinion, the case of the Plaintiff had no merits. The case was this:—it was a bill filed by the Plaintiff on behalf of himself and all others the holders of scrip and shares in the *Boston and Newark and Sheffield Railway*, which failed. The subscribers' agreement provided, that a deposit of two guineas and a half should be paid on each share taken by him, and that, whether the act should be obtained or not, each of the subscribers, out of the deposit money, should indemnify the trustees against all losses and expenses then or thereafter to be incurred. The trustees returned three

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instalments

1858.  
WILLIAMS  
v.  
PAGE.

instalments to the shareholders, amounting altogether to 1*l.* 14*s.* per share. The Plaintiff and the other shareholders accepted the two first instalments, amounting to 1*l.* 12*s.* 6*d.*, but refused to accept the final instalment of 1*s.* 6*d.*, and the Plaintiff filed his bill for a common account, not alleging any misconduct or error in the accounts. The Vice-Chancellor held, that since the directors were entitled to indemnity out of the deposits, and as the result of opening the account might be that the Plaintiff and persons similarly circumstanced had received more than they were entitled to, and that they would therefore have to refund, that in that event the persons in the situation of the Plaintiff, on whose behalf he was suing, and who represented 7,000 shares, must be made parties individually; and the Vice-Chancellor also held, as I have stated, that the Plaintiff had no merits, and thereupon dismissed the bill with costs. On appeal, the Defendants having offered to repay the Plaintiff his instalments in full, without prejudice to the question of costs, which was to be left to the Court, the Lords Justices expressed no opinion on the right to the account, and awarded to the Defendants 300*l.* in respect of the costs of the suit from the Plaintiff.

The distinction between that case and the present are obvious. In the first place, there is an absence of allegation of any fraud or misconduct or partiality against the Plaintiff, which is alleged and proved in the suit before me. In the second place, here no accounts at all have been rendered; and thirdly, no such indemnity clause exists in the subscription contract. In the present case it is merely a covenant on the part of the persons subscribing that contract, that in case the application to Parliament should fail, they will discharge all the expenses incurred or to be incurred rateably, in proportion to the sum subscribed by them respectively.

The

The only other case which bears closely on the present is the case of The *Grand Trunk* Railway Company against *Brodie* (a), before Lord Justice *Turner*, when Vice-Chancellor. It was a bill by one shareholder, on behalf of himself and the others, except the Defendants, who were the provisional directors and the secretary, not only for a general account, but to recover certain specific moneys alleged to have been abstracted from the funds of the company by the fraud or negligence of the Defendants. The company failed in 1846. The bill was filed on the 23rd of *December* in that year. A first instalment of one guinea per share, and a second of 2s. 6d. per share, was paid. The shareholders who received the last instalment signed a memorandum, undertaking to sign a release to the directors when called upon to do so. The Vice-Chancellor held, that this was a new contract, and that if a case of fraud were established, the persons who signed that memorandum were entitled to elect whether they would abide by that transaction or set it aside, and if set aside, that it must be set aside wholly and not partially or merely to the extent of the money not received. He also held, that the Plaintiff could not exercise this option on behalf of absent persons, he therefore could not sue on their behalf, and that the objection was not covered by the 35th section of the Statute which he referred to. The Court also held, that the suit wholly failed on the merits, and that the fraud and negligence alleged were disproved, and accordingly the Vice-Chancellor dismissed the bill with costs.

It is material to observe, that the bill in that case was originally filed by the former solicitor of the company, who had indemnified the Plaintiff against costs. It does

1858.

WILLIAMS  
v.  
PAGE.

(a) 9 *Hare*, 823.

1858.

WILLIAMS  
v.  
PAGE.

does not affect the question before me, but it is proper to observe, that in that case, the company was in the course of liquidation under the Winding-up Acts, and that the official manager had adopted and continued the suit, and the Vice-Chancellor held, that he continued in the same situation as the original Plaintiff, and ordered him to pay the costs of the suit.

The distinctions between that case and the present are also very marked and important. In that case, the fraud and negligence alleged, and on which the relief was founded, were disproved at the hearing; in the present case the undue retention and payment is admitted and attempted to be justified. In that case, also, the shareholders who had received the instalments, had received them in full, and had entered into an undertaking to release the directors from all further claims and liabilities, which circumstance is also wanting in the case before me.

These cases appear to me to be all consistent and uniform: I should be strongly disposed to hold, that the shareholders could not institute such a suit as the present, after an account rendered, all matters disclosed, no fraud proved, and no objection taken for any considerable time; and that in any such case, the Court would not allow the Plaintiff to remedy any defect of parties: but the case is very different, where a substantial case of improper retention of moneys is established against the Defendants.

The third objection, namely, that the three other shareholders who have been favoured by having their deposits returned in full are not before the Court, and are neither represented by the Plaintiffs nor by the Defendants, is, in my opinion, a more serious objection  
in



in the Plaintiffs' way than the other two of which I have disposed. If this had been a mere bill for an account, not alleging or proving any instance of improper conduct on the part of the provisional committee in the management of the funds of the projected company, the Plaintiffs would certainly have represented all the shareholders, except those against whom the account was sought. But in that case, I doubt much whether, having regard to the peculiar nature of the business, the time which has elapsed, and the authorities that I have referred to, I should have granted any relief at all. But this is a case where, besides seeking a general account against the managing body, the Plaintiffs have established a case of express and intentional partiality in favour of themselves and of three other persons, not being members of the managing body. The managing body cannot represent those three, because they are not liable to account, as trustees or otherwise, in respect of that for which, principally, the present Defendants to this suit are made parties; and on this part of the case the interests of the three absent persons are identical with that of the Plaintiffs: but, on the other hand, the Plaintiffs cannot represent them in this suit, for their interests are adverse in other respects, inasmuch as the principal ground of complaint, and that which mainly influences the Court in giving any relief, is a matter in respect of which an undue payment has been made to these very three persons, and in respect of which, also, if I am right, they will probably have to refund. I cannot find that this objection arose in the case of *Clement v. Bowes*. It certainly is not dealt with by the Vice-Chancellor in his judgment. I think the objection insuperable, and that it is impossible to treat this as a bill by the three as co-Plaintiffs, complaining of an act by which they are gainers at the expense of their co-Plaintiffs; between them and their co-Plaintiffs there  
is,

1858.

  
WILLIAMS  
v.  
PAGE.

1858.

WILLIAMS  
v.  
PAGE.

is, in this respect, a direct conflict of interest. I must therefore allow the objection as to the absence of these three person; but in respect of this, I shall allow the cause to stand over, with liberty to the Plaintiffs to amend by making these persons or their representatives parties. If, on receiving notice of these proceedings, they will take copies of the evidence and appear before me to argue the case as if they had originally been parties, it may save some considerable amount of expense; but they may have a defence which does not appear in the proceedings before me, and therefore may be advised not to adopt this course, and it is the consideration that this may be the case that induces me not to adopt the other course, of directing them merely to be served with a copy of the decree and liberty to attend the taking of the account, which will be directed under the decree. This further expense may possibly be avoided, if the Plaintiffs confine the relief they ask to the repayment of the 9,975*l.*, and the proper distribution of that sum amongst the shareholders; but this very suggestion shews the impossibility of my dealing with the case in the absence of the three, who will, in that case, have to refund.

Hitherto I have made no distinction between any of the classes of Defendants; but, in truth, a very material distinction exists between them, which it is necessary now to consider. The observations I have hitherto made have been directed to those Defendants for whom Mr. *Lloyd* and Mr. *Speed* appear, and as to whom, I consider it to be established or admitted that they acted as members of the provisional committee throughout, and that they made or sanctioned the retention or payment in question. These are, I believe, the seven Defendants following, namely, *Page*, the two *Cobbolds*, *Welstead*, *Ransome*, *Callis* and *Porter*. The same observations

servations apply also to *Bernard, Lindsay* and *Gee*, who are dead, but whose representatives are parties to this suit. Besides which, all these persons subscribed to the additional shares, and made or procured to be made payment of the deposits on the 1,300 additional shares, for the purpose of complying with the Standing Orders of the House, and they are therefore, in both characters, necessary parties to this suit.

With respect to all the other Defendants, except those who are out of the jurisdiction (*Bunbury* and *Cochrane*), in my opinion the case wholly fails. I think it unnecessary to go through the details and their greater or less participation in the affairs and management of the company. Some of them were never even provisional directors, and the others acted a very short time, and withdrew before the project was matured, or its extent finally settled. None of them were directors or members of the committee at the time of the transaction in question; none of them sanctioned the proceedings complained of, or the retention of the money advanced to comply with the Standing Orders of the House of Lords. Against all these Defendants the bill must be dismissed, and the Plaintiffs must pay their costs.

The Plaintiffs ought, before making these persons parties to the suit, to have carefully ascertained how and to what extent each of them had acted, nor was this a matter of any difficulty, as all the evidence on which either side relies, indeed all the evidence on the subject is consistent with and confirmatory of the entries which appear in the minute book of the company, to which the Plaintiffs might have obtained access, certainly immediately after the institution of the suit, and for ought that I have heard, I believe at any time they

1858.

WILLIAMS

v.

PAGE.

1858.  
WILLIAMS  
v.  
PAGE.

they thought fit. The Plaintiff *Williams*, at least, inspected the books and accounts as he pleased; and although the other Plaintiff was refused to be allowed to examine the accounts, on his verbal application, it does not appear that he ever applied, in writing or in any formal manner, for leave to inspect the books of the company; nor does it appear to me probable, from the evidence which is before me, that if he had done so he would have been refused. The bill will therefore be dismissed as against the Defendants *Bradley, Curtis, Sharman, Jeyes, Haddon, Day, Elgood, Cottle and Thorne*.

[Mr. *J. H. Palmer*. Many of these persons were added as parties by amendment, the Defendants who are now held liable having, by their answer, insisted, that all the persons who acted as members of the provisional committee, and the representatives of such as were dead, were necessary parties to the suit, and they required all such persons to be made parties to the suit.]

*The MASTER of the ROLLS*. I am aware of that, but I do not consider a Plaintiff is justified in making a person a party, merely because the Defendants insist that he ought to be a party.

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1857.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL,

*Informant,*

AND

The DEAN and CANONS of The QUEEN'S FREE  
CHAPEL of SAINT GEORGE, within the CASTLE  
of WINDSOR, The ECCLESIASTICAL COMMIS-  
SIONERS for ENGLAND, HER MAJESTY'S  
SOLICITOR-GENERAL, and The MILITARY  
KNIGHTS of WINDSOR (*nominatim*),

Dec. 7, 8, 9,  
10.

*Defendants.*

1858.  
Jan. 19.

THIS information was filed by the *Attorney-General* *ex officio*, in consequence of an address of the House of Commons to her Majesty on the subject, and the question was, whether the Military Knights of Windsor were entitled to participate in the increased revenues of the "new dotation" acquired under *Edward VI.*, the dean and canons having claimed and applied

The Military  
Knights of  
Windsor held  
entitled to no-  
thing beyond  
the fixed pay-  
ment given  
them by the  
original founda-  
tion, and to  
have no inter-  
est in the in-  
crease of the  
surplus rents.

Lands of the annual value of 661*l.* 6*s.* 8*d.* were conveyed to the Dean and Canons of Windsor, for the maintenance of specified charitable purposes, amounting to 430*l.*, including therein a fixed payment to the Dean and Canons, "and the residue, being (as the document stated) 231*l.* 6*s.* 8*d.*, to remain for the vicar's and serving priest's wages, and, when need requireth, reparation of the said lands, the officers' fees, and for the relief of the said dean and canons and their successors." The rental increased to about 14,000*l.* a year. Held, on the authority of *The Attorney-General v. Beverley*, that the dean and canons took beneficially the whole surplus rents, after paying the fixed charges.

There is a resulting trust in the grantor, where lands are conveyed on charitable trusts to be afterwards declared, and no subsequent declaration is made.

There is a presumption against persons who keep back a document, and against them the evidence is to be taken most strongly.

A deed of 1559 presumed, under the circumstances, to have been executed by Queen *Elizabeth*.

The Ecclesiastical Commissioners held entitled to no greater rights in the suppressed canonries, under the 3 & 4 *Vict.* c. 113, than the former canons were, and to be subject to the same trusts.


1857. applied to their own use the large surplus beyond the  
 fixed payments.  
 ATT.-GEN.  
 v.  
 The DEAN AND CANONS OF WINDSOR. The circumstances under which the point arose were these.

King *William* the Conqueror built the castle of *Windsor* about 1067 ; it was enlarged by *Henry* I., who erected a chapel thereon, and founded a college of eight canons, to be maintained by an annual pension, payable out of the royal exchequer.

*Edward* III. rebuilt the chapel and founded the Order of the Garter therein, and by his letters-patent of the 6th of *August*, 1348 (being the charter of foundation and endowment of the chapel or college), he did, to the aforesaid eight canons, appoint, that there should be one custos presiding over them and fifteen further canons, twenty-four poor knights, impotent of themselves or inclining to poverty, and for ever to be supported of the goods of the said chapel, and other ministers of the said chapel, to whom the King did grant the rights of patronage and advowsons of the churches of *Wywardesbury*, *Southampton* and *Uttoxeter*, in free, pure and perpetual alms. The King further willed, that so much should be bestowed to them from his treasury, as, with the emoluments arising from the aforesaid churches, should seem sufficient for their diet and the support of the charges incumbent on them, until lands of 1,000*l.* per annum should be provided by him ; all which things he promised to fulfil.

The letters-patent were confirmed by the Pope in 1351, and the college and chapel of *St. George, Windsor*, was founded, consisting of one custos (a secular canon) and twelve other secular canons, thirteen presbyters or vicars;

vicars, four clerks, six clerical choristers and twenty-six alms knights. The statutes were signed by *Edward III.* in 1352; and, by the fifth of such statutes, it was provided, that the alms knights should receive, each of them twelve pence by the day *pro quotidiano victu* and forty shillings by the year for all other necessities; one-third of the surplus rents was to be set aside for the use of the chapel, to be applied for their advantage or necessities arising from fire, murrain of animals, or the failure of corn, or otherwise for the defence of their rights, if it should be needful to litigate, or for the increase of their rents, and the remainder was to be equally divided between the wardens and canons residentiary.

1857.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

King *Edward III.*, about the same time, founded, in the said chapel or college, the Most Noble Order of the Garter, of which the Sovereign and twenty-five Knight Companions formed the complete chapter, under whom were instituted a custos and twenty-five canons, twelve of them secular (or *majores*), and thirteen vicarial (or *minores canonici*), and a governor and twenty-five other alms or poor knights.

In the 19th *Edward IV.*, the dean and canons were incorporated, and by an Act of Parliament of the 22nd *Edward IV.*, obtained (but as the knights represented by surprise and fraudulent misrepresentation) an Act of Parliament, whereby they were incorporated, and it was ordained, that the same deans and canons, and their successors for evermore, should be utterly discharged from all manner of exhibition or charge, of or for any of the alms knights.

The alms knights being thus left unprovided for, it appeared, that in the reign of *Henry VIII.*, his Majesty  
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1857.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

had resolved on making a provision for them ; and, in 1511, King *Henry VIII.* requested the dean and canons to provide for *Peter Narbonne*, one of the *alms knights*, a maintenance, and they accordingly granted him a life pension, upon condition that he would relinquish it, when his Majesty should settle lands on the college and chapel for the provision of the said knights, as he had promised to do or given them to understand he would so do. The King, by letter, stating that they were not bound to find any alms knight, thanked them and reiterated his promise ; but he never fulfilled it in his life.

It also appeared, that, in 1546, the said dean and canons, by deed, conveyed the manor and rectory of *Ivor*, in the county of *Bucks*, and *Damarye Court*, and other hereditaments of the yearly value of 160*l.* 2*s.* 4*d.* to King *Henry VIII.*, in exchange for other hereditaments which his Majesty promised to convey at some future period, but which promise he never fulfilled.

King *Henry VIII.*, by his will bearing date the 30th day of *December*, 1546 (amongst other things) expressed himself as follows, namely :—" Also we woll that with as convenient spede as may be doon after our departure out of this world, if it be not doon in our life, that the deane and chanons of our free chaple of *St. George*, within our castle of *Windsor*, shall have manoures, landes, tenements and spiritual promotions to the yearly value of six hundred poundes over all charges made sure to them and their successors for ever, upon these conditions hereafter ensuing." He then directed them to find two priests to keep four obits yearly, and at every of them to give to poor people in alms ten pounds, and proceeded thus :—" And also to give for ever, yearly, to thirtene poor men, which shall be called *poor knights*, to every of them twelf pens every daye, and once in the

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the year, yearly for ever, a long gowne of white cloth with the garter upon the breast, embroidered with a shield and cross of *St. George* within the garter, and a mantle of red cloth; and to such one of the said thirtene poor knights as shall be appointed to be hed and governor of them, 3*l.* 6*s.* 8*d.* yearly for ever, over and besides the said twelf pennes by the daye." And he charged and required his son prince *Edward*, and his executors and counsaillors, his heirs and successors, to see that the said indenture and assurance be made. And the King willed, that all his grants and gifts promised as were not perfected, and all exchanges as were not accomplished, should be perfected.

King *Henry VIII.* died on the 23rd day of *January*, 1546-7, without having executed any such indenture as mentioned in his will, or perfected on his part the exchange with the dean and canons. His will was inoperative as regarded conferring any rights on the dean and canons.

In 1547, King *Edward VI.* and the Privy Council and executors consulted with the Judges and law officers as to carrying the directions of the will into effect, and in pursuance thereof, on the 2nd day of *August*, 1547, Sir *Edward North*, the Chancellor of the Court of Augmentation, signed certain written instructions for the preparation of a conveyance in pursuance of the will, which now remained among the records of the late Court of Augmentation. It enumerated the parcels of land and tithes of various rectories belonging to the Crown, and specified the annual rental of them, which was set down as amounting to the clear yearly sum of 812*l.* 12*s.* 9*d.* From this amount it stated, there was first to be deducted 160*l.* 2*s.* 4*d.* for the lands of *Ivor*, &c. taken by *Henry VIII.* from the Dean and Canons of *Windsor*,

1857.

ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

1857.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

*Windsor*, and then for the King's gift, in accomplishment of the will of *Henry VIII.* by the year 600*l.*, and there remaineth 52*l.* 10*s.* 5*d.*, which is to be reserved in a yearly rent to the Crown. The document contained this memorandum :—

“Memorandum :—That the said dean and canons must be bound to observe and keep all such rules, orders and ordinances as shall be hereafter devised by the Lord Protector and other his co-executors, which shall be declared, prescribed and set forth in a book indented, or otherwise by indenture, to be subscribed with the hands of the said Lord Protector and the said executors, and delivered to the said dean and canons.”

The next document was an indenture duly executed, dated the 4th of *August*, 1547, and made between *Edward VI.* of the first part ; the Lord Protector and the executors of the will of *Henry VIII.* of the second part ; and the Dean and Canons of *Windsor* of the third part. It recited the will of *Henry VIII.*, the grant of the land and hereditaments of *Ivor* and *Darmaye* Court, by the Dean and Canons of *Windsor*, to *Henry VIII.* amounting to 160*l.* 2*s.* 4*d.*, and that the dean and canons were still remaining unrecompensed in respect thereof, and that his then Majesty “was minding nothing more than the accomplishment and performance of the said last will and testament of his most dear and entirely beloved father, and as well for the assurance of the said lands, tenements and hereditaments, to the said yearly value of 600*l.*, to be had and made to the said dean and canons and to their successors for ever, to and for such uses, intents and purposes mentioned in the said last will, and for the maintenance and performance of all and every such ordinances, rules, acts and things as thereafter should be

be limited, prescribed and appointed to the said dean and canons, by the said lord the King and the said Lord Protector and his said co-executors, or by the more part of them, in an indenture of three parts, to be made between the same King and the said Lord Protector and his said co-executors and the said dean and canons, and as well for the application of the said lands, tenements and hereditaments to the said yearly value of 600*l.* to be had and made. The King then promised and granted, and the Lord Protector and his co-executors did covenant and grant to the Dean and Canons of *Windsor* and their successors, that his Majesty, by his Grace's letters-patent, should, before the Feast of the Nativity of our Lord God then next ensuing, give and grant unto the said dean and canons all those his Grace's parsonages, &c., and hereditaments therein particularly described (being those comprised in the "instructions" and in the letters-patent next hereinafter mentioned), to hold the same to the dean and canons, and their successors for ever, of the King in free alms, paying to the King two rents, making together 52*l.* 10*s.* 5*d.*, in full of all rents, services, tenths and first fruits. Then followed a covenant, that, at the day of grant, the lands should be worth 760*l.* 2*s.* 4*d.* over the 52*l.* 10*s.* 5*d.* And the said dean and canons thereby covenanted with his said Majesty, and the said Lord Protector and his said co-executors, that they, the same dean and canons, and their successors, should bestow and employ the rents, revenues and profits of so much of the said prebends, parsonages and other the premises, to be granted to the said dean and canons in form therein aforesaid, as should amount to the said yearly value of 600*l.*, or of so much thereof as to the said Lord Protector and his said co-executors should be thought meet and convenient, in and about such acts, ordinances, intents and purposes, as by his said Majesty, the said Lord Protector and his said co-

1857.

ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

1857.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

executors, should be prescribed, limited and appointed, in the said tripartite indenture thereafter to be made between his said Majesty, the said Lord Protector and his said co-executors, and the said dean and canons; and also, that they, the same dean and canons, and their successors, should for ever observe, perform, fulfil and keep all and singular such acts, ordinances and rules, as in the same indenture thereafter to be made should be specified and contained."

By letters-patent under the Great Seal of *England*, bearing date the 7th day of *October*, 1547, his said Majesty King *Edward VI.* (as well in performance of certain promises and bequests by his said father's will made and declared, as in performance and fulfilment of certain grants, covenants and promises contained and specified in the said indenture of the 4th day of *August*, 1547, therein mentioned and referred to, as in consideration of the said manor and rectory of *Ivor* and of the manor of *Damarye Court*, and other hereditaments given to his said father), granted to the dean and canons all the hereditaments specified in the "instructions" and in the indenture of the 4th of *August*, 1547, to hold the same in free and perpetual alms unto and to the use of them and their successors for ever, rendering yearly to the King for ever 52*l.* 10*s.* 3*d.* in full of all services, &c.

It did not appear that the contemplated tripartite indenture was ever executed; however, the dean and canons entered into possession of the property, and kept separate accounts of the old and new *dotation*.

The next document affecting the question was lost, and it was disputed whether it had ever been executed by Queen *Elizabeth* or by the dean and canons; but the Court came to the conclusion, that it had been executed  
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by the Queen, and that the execution by the dean and canons was immaterial (*a*). It was called "*the deed of distribution.*"

1857.

ATT-GEN.

v.

The DEAN  
AND CANONS  
OF WINDSOR.

By this "deed of distribution," dated the 30th of *August*, 1559, and made between Queen *Elizabeth* of the one part, and the dean and canons of the other part, "it was witnessed, that whereas divers manors, &c. mentioned in a schedule, of the clear yearly value of 600*l.* and above, were given and assured unto the said dean and canons and their successors, to and for the intent and purpose that the revenues and profits of the same should, for ever, be employed and bestowed for the maintenance of thirteen poor knights within the castle of *Windsor*, and otherwise in such manner and form as in one book annexed thereto, and signed with the sign manual of the said Queen, was set forth and declared," the dean and canons (for the better observance of the statutes, orders and rules mentioned and contained in the said book) did thereby covenant with her Majesty, that they should for ever distribute, &c. the rents of the said manors, &c. in such manner and form, as by her Majesty, in the said book thereunto annexed, was set forth, declared and appointed, and faithfully observe all the ordinances, rules, statutes and acts and things mentioned and contained in the said book. And if the said dean and canons or their successors, or any of them, should, at any time or times thereafter, fortune to omit anything to them appointed to be done, performed or executed by the said ordinances, rules and statutes, and not to perform the same according to the effect and true meaning thereof, that then they the said dean and canons, and their successors, for every such default, offence or negligence, so by them to be permitted, done

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(*a*) See *post*, pp. 706, 707.

1857.

ATT.-GEN.

v.

The DEAN  
AND CANONS  
OF WINDSOR.

or suffered, should stand to, obey and abide such correction, pain, punishment and order as should be made, declared or appointed by her said Majesty, her heirs or successors, or by such person or persons, of the Noble Order of the Garter, as by her Majesty, her heirs or successors, should be thereunto named and appointed.

Queen *Elizabeth*, by the annexed book, after reciting the erection of the college within the castle at *Windsor*, she (minding the continuance of the same, and specially upon knowledge given her of the last mind and will of her most dear father, of noble memory, King *Henry* the Eighth, to make a special foundation and continuance of thirteen poor men, decayed in wars and such like service of the realm, to be called "Thirteen Knights of *Windsor*," to be kept there in succession) had therefore by those presents, not only set forth and expressed the foundation of the said thirteen poor knights, with certain orders and rules for the better government of them, and by them to be observed and kept, but also had likewise, by those presents, expressed and declared how and in what manner the revenues and profits of certain manors, lands and tenements, of the yearly value of 600*l.*, given and assigned to the said dean and canons and their successors by her said Majesty's said dear father, should be bestowed and employed for the maintenance of the said thirteen poor knights and otherwise, according to the mind and will of her said most noble father: Wherefore her said Majesty thereby declared her will and pleasure to be, that the said dean and canons and their successors should, for ever, not only cause those her said Majesty's ordinances and rules thereafter written firmly to be observed and kept, but also should from time to time convert and bestow the rents, &c. of the said manors, &c. to such uses, &c. as thereafter is declared.

Then

Then followed "The orders and rules for the establishment and good government of the said thirteen poor knights."

The document then proceeded thus:—"The Queen's Majesty's Ordinances for the continual Charges, viz."

These fixed charges were then specified, concluding thus:—"Sum total, 430*l.* 19*s.* 6*d.*" These were composed as follows:—To the dean and canons, clerks, choristers and officers belonging to them, 95*l.* 19*s.* 10*d.*; to the thirteen poor knights, and for their gowns, mantles, &c., 288*l.* 6*s.* 4*d.*; for four quarters' dole, 20*l.*, and for two scholars at *Oxford* and two at *Cambridge*, 26*l.* 13*s.* 4*d.*

It then specified the "lands appointed for the said charge," shewing a rental of 661*l.* 6*s.* 8*d.*, and the document proceeded as follows:—"Which said lands and other the premises, amounting to the said sum of 661*l.* 6*s.* 8*d.*, we will and ordain and by these presents declare shall remain to the said dean and canons, and to their successors for ever, that is to say, for the maintenance of the charges of 430*l.* (a) before declared, and the residue, being 231*l.* 6*s.* 8*d.*, to remain for the vicars and serving priests' wages, when need requireth reparation of the said lands, the officers' fees, and for the relief of the said dean and canons and their successors." And in the said book is contained an entry as follows:—"Her Majesty hath ordered that yearly her lieutenant, with other the companions of the order, shall see the just account of the lands, and how the revenues thereof are expended, and how the several payments above mentioned are duly paid."

The rental of the lands conveyed by *Edward VI.*, called the "*new dotation*," had of late greatly increased, and the dean and canons had always insisted that they

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(a) *Sic*, and not 30*l.* 19*s.* 6*d.*

1857.  
ATT.-GEN.  
v.  
THE DEAN  
AND CANONS  
OF WINDSOR.

1857.  
  
 ATT.-GEN.  
 v  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

were entitled to the surplus income after providing for the fixed payments. The poor knights (whose designation had been changed by King *William IV.* into the Military Knights of *Windsor*) had insisted that they were entitled to participate rateably in the increase. Frequent disputes had arisen between them which are referred to in the judgment of the Court (*a*), but they had never been authoritatively settled. The rents were now stated to amount to about 14,000*l* a year.

By recent Acts of Parliament, 3 & 4 *Vict.* c. 113, ss. 9, 49, and 4 & 5 *Vict.* c. 39, s. 25, the Chapter of *Windsor* was now reduced to a dean and six canons, and the profits of the suppressed canonries were vested in and paid to the Ecclesiastical Commissioners, who were thus rendered necessary parties to this information.

This information prayed, first, a declaration that the whole of the lands granted to the dean and canons by the letters-patent of the 7th day of *October*, 1547 (except so much as were taken in the exchange), "were so granted upon the charitable trusts, and to and for the intents and purposes declared by the will of King *Henry VIII.* and by the said indenture of the 4th day of *August*, 1547; and that all the objects of such charitable trusts were entitled to participate proportionately in the improved rental and value of such lands and hereditaments."

2. That it might be ascertained to what charitable purposes and objects the new dotation was now applicable, and that a Scheme might be settled for its future application accordingly.

The information now came on for hearing.

The *Attorney-General* (Sir *R. Bethell*), Mr. *Selwyn* and Mr. *T. H. Terrell* for the Informant.

Mr.

(*a*) *Post*, p. 707.



Mr. *Teed*, Mr. *Follett*, Mr. *Dewsnap*, Mr. *Bernard*  
and Mr. *Cracknall* for the Military Knights.

1857.

ATT.-GEN.

The *Solicitor-General* (Sir *H. S. Keating*) and Mr.  
*Wickens* for the Crown.

v.  
The DEAN  
AND CANONS  
OF WINDSOR.

Mr. *R. Palmer*, Mr. *Cairns* and Mr. *Hobhouse* for  
the Dean and Canons of *Windsor*.

Mr. *Dugmore* and Mr. *Fleming* for the Ecclesiastical  
Commissioners.

The following cases were cited:—*Moggeridge v. Thackwell* (a); *Attorney-General v. The Mayor of Bristol* (b); *Attorney-General v. Caius College* (c); *Attorney-General v. Heelis* (d); *Nightingale v. Goulburn* (e); *Attorney-General v. The Skinners' Company* (f); *Attorney-General v. The Mayor and Corporation of Beverley* (g); *Page v. Leapingwell* (h); 43 *Eliz. c. 4*, "Charitable Uses;" *The Mayor of South Molton v. Attorney-General* (i); *Attorney-General v. The Cordwainers' Company* (k); *Jack v. Burnett* (l); *Attorney-General v. Smythies* (m); *Attorney-General v. Grocers' Company* (n); 4 & 5 *Vict. c. 39*.

*The MASTER of the ROLLS* reserved judgment.

*The MASTER of the ROLLS.*

This is an information filed by her Majesty's At-  
torney-General *ex officio*, for the purpose of obtaining  
a new

1858.  
Jan. 19.

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|--------------------------------------------------------------------------|-------------------------------------------------------|
| (a) 7 <i>Ves.</i> 36.                                                    | 15 <i>Beav.</i> 540; 6 <i>De G., M. &amp; G.</i> 256. |
| (b) 2 <i>J. &amp; W.</i> 294.                                            | (h) 18 <i>Ves.</i> 463.                               |
| (c) 2 <i>Keen</i> , 150.                                                 | (i) 5 <i>H. L. Ca.</i> 1, and 14                      |
| (d) 2 <i>Sim. &amp; S.</i> 67.                                           | <i>Beav.</i> 357.                                     |
| (e) 5 <i>Hare</i> , 484; S. C. on ap-<br>peal, 17 <i>L. J., Ch.</i> 296. | (k) 3 <i>Myl. &amp; K.</i> 534.                       |
| (f) 2 <i>Russ.</i> 407; S. C. 5 <i>Sim.</i><br>596.                      | (l) 12 <i>Cl. &amp; Fin.</i> 812.                     |
| (g) 6 <i>H. Lds. Ca.</i> 310; S. C.                                      | (m) 2 <i>Russ. &amp; M.</i> 717.                      |
|                                                                          | (n) 6 <i>Beav.</i> 526.                               |

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

a new distribution of the property granted to the Dean and Canons of *Windsor* by *Edward VI.*, in accordance with what is alleged to be the trusts properly attaching to it. The object is, that under such new distribution, the Poor Knights of *Windsor* may receive such a share of the charity as they were originally intended to receive, or that if it shall appear that the whole property is given upon charitable trusts which were not validly or accurately defined, then that the whole may be distributed according to a scheme for that purpose, to be settled by the Court.

To this information the Ecclesiastical Commissioners, her Majesty's Solicitor-General and the Poor Knights of *Windsor* are made parties. The Ecclesiastical Commissioners are made Defendants, by reason of certain portions of the property derived from the grant of *Edward VI.* having become vested in them for the purposes specified by Parliament in an act (*a*) passed for that purpose. Their case is, that, whoever may be the *cestuis que trust*, and on the assumption that the Court shall make a decree establishing such trusts, still that they, as Ecclesiastical Commissioners, and the persons in whom the property is vested by Act of Parliament, are entitled to hold the property discharged of those trusts. In my opinion this is an erroneous view of the construction and effect of the statute. It is true that the general saving clause protecting the rights and interests of all absent persons, which is invariably inserted in all private Acts of Parliament, is not to be found in the present, which is a public act; but I apprehend, that the introduction of this general saving clause, in private Acts of Parliament, arises *ex majori cautela*, and that the omission of it, in public statutes transferring lands from

(a) 4 *Vict.* c. 113, ss. 9, 49, and 5 *Vict.* c. 39, s. 25.

from one public body to another, does not infer, that the Legislature thereby intended to defeat the interests of absent parties, whose rights they had no knowledge or notice of. When such is the intention of the Legislature, a clause is introduced expressly for that purpose, as in the statute relative to the sale of incumbered estates in *Ireland* (a), declaring that the estate conferred by Parliament is to be indefeasible. Here, the Legislature intended to transfer certain property from the Dean and Canons of *Windsor* to the Ecclesiastical Commissioners for certain ecclesiastical purposes, but in doing so, it did not intend to render the title of the Dean and Canons of *Windsor* valid to lands they were not entitled to hold. If, therefore, it should afterwards appear, that the property so transferred was, while in the hands of the Dean and Canons of *Windsor*, subject to a trust in favour of others, and that this trust had not been taken away by the statute, it still continues in force on the property in the hands of the Ecclesiastical Commissioners. In other words, I consider that what is conveyed to the Ecclesiastical Commissioners by the Act of Parliament is the interest of the dean and canons in the property specified, and that the interest of others, not at that time known of or considered, and who were not, if I may so say, before Parliament when that act was passed, is not affected thereby.


The question, therefore, as regards the Ecclesiastical Commissioners, must stand on exactly the same grounds as that of the Dean and Canons of *Windsor*, and the property, when in the possession of the commissioners, will be subject to the same trusts, if any, that attach to it in favour of the Poor Knights of *Windsor*, as if it were still in the possession of the dean and canons.

The

1858.

ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

(a) 11 & 12 Vict. c. 48, s. 27.

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

The Solicitor-General was made a Defendant by reason of some interest in the Crown of a private and individual character, and which might result from the original grant and the mode of administering the property, distinct from the rights of the Crown as *parens patriæ* in favour of the charitable trusts, and which are properly represented by the Attorney-General. I will reserve, until I enter on the examination of the evidence in the case, the consideration of whether any such private interest (if I may so express myself) can still exist in the Crown.

The Poor Knights of *Windsor* in substance support the information, but with a qualified support, and only so far as it seeks for such relief as may ultimately give them an increased share and interest in the estates in question. They contend that they were the original and principal objects of the charity, and that what is required, for the purpose of duly executing the trusts impressed on the property granted by *Edward VI.*, is, to give them now the same share of the rents of the property, as they had when the "new dotation" was made.

The Attorney-General, however, has rather contended that the residue of the whole property, subject to certain specified charges, is given to or impressed with a general charitable trust, and that these having failed, or not having been validly or sufficiently expressed, it becomes the duty of the Court to direct the mode of application thereof, by a scheme to be settled for that purpose.

The question in the cause before me, which has been agitated, without being decided, for two centuries and upwards, is the ascertainment and defining of the character in which, and subject to what trusts and obligations, the Dean and Canons of *Windsor* held the property

property deived from *Edward VI.*, prior to the act transferring a portion of it to the Ecclesiastical Commissioners, and what is the extent of such trusts and obligations, if any, as may be still subsisting. For the purpose of arriving at a satisfactory conclusion on this subject, it is necessary to examine minutely and weigh carefully the evidence which has been adduced in this cause. This I have done to the best of my ability, and I will proceed briefly to state the effect of it and the conclusions to which I have come. The case has been got up with very great care on both sides, and I feel little doubt, but that all the material evidence which is extant has been brought to the attention of the Court. The mass of it is considerable, little of it is without weight, but the values of the different portions of it vary considerably. The evidence of first and paramount importance are the deeds constituting the original grant by *Edward VI.*; 2ndly, such documents as explain or assist in explaining and construing the tenor of those documents; 3rdly, the evidence of usage and dealing with the property by the parties concerned.

I think it unnecessary to go into any circumstances connected with the original constitution of the charity or the history of it prior to the time of *Henry VIII.* It is sufficient to remark, that the Dean and Canons of *Windsor* and the Poor Knights were originally a part of, or intimately connected with, the establishment of the Order of the Garter, all of whom, as well as the Knights Companions of the Garter, were under the special patronage and protection of the Sovereign of the realm, who was and is the Sovereign of the order. The number of the poor knights, as distinguished from the knights companions, was reduced from the number originally contemplated, and although a sufficient endowment had been afforded for the support of the dean  
and

1858.

ATT.-GEN.

v.

THE DEAN  
AND CANONS  
OF WINDSOR.

1858.


ATT - GEN.

v.

The DEAN  
AND CANONS  
OF WINDSOR.

and canons in the time of *Edward III.*, which is called the old dotation, no endowment had been made by the Crown for the support of the poor knights. *Henry VIII.* seems early to have had it in contemplation to repair this deficiency, and accordingly, as early as the year 1511, when he requested the dean and canons to provide for the support of *Peter Narbonne* as a poor knight, he referred to the promise he had made to settle lands on the college and chapel and for the provision of the poor knights, and he seems then to confirm that promise. Nothing, however, was done by him in this respect, and it was not till the reign of *Edward VI.* that any grant of lands or endowment was made. Indeed *Henry VIII.*, so far from carrying his promise into effect, had, in the last year of his reign, taken from the dean and canons lands and hereditaments of the annual value of 160*l.* 2*s.* 4*d.*, in exchange for nothing more substantial, than a promise made by him to convey, at some future time not specified, lands and hereditaments of equal value to the Dean and Canons of *Windsor*, but which promise he did not live to perform. He did, however, by his will, bearing date the 30th *December*, 1546, refer expressly to this subject, and, as far as in him lay at that time, he made such provision as he could, for the purpose of inducing his successor to carry this promise into execution. This document is one of considerable importance for the decision of the question before me, and having regard to the manner in which it is referred to in the instrument constituting the grant, it may be regarded almost in the same light as the instrument of *Edward VI.*, to which I shall presently refer. It is important, however, to estimate it at its real value, which was, so far as regards the conferring of any rights on the dean and canons or on the poor knights, wholly valueless; it passed nothing; under it no one took any land or any interest

interest in any land. The value of the document is this:—that, instigated by this will, *Edward VI.*, under the advise of his councillors, made the grant in question; and this will, therefore, must be regarded as the source from whence the bounty of *Edward VI.* flowed, and must be examined for the purpose of explaining whatever is ambiguous in the grant of *Edward VI.* If the documents are contradictory, the grant of *Edward VI.* is paramount; that monarch was under no obligation, other than a moral one, to comply with the will of his father. If he has done so in a different manner to that pointed out by the father's will, still the grant by the son is paramount, and must govern the question before me. Regarding this will in this limited manner, it is still of the highest value and interest. That portion which relates to this subject is in the following words: "Also we will"—[*see ante*, p. 682.]

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

The observation which is obvious upon this will is, that the property was to be given to the Dean and Canons of *Windsor*, on conditions thereafter specified, the performance of which by the dean and canons was to be secured by their covenant. It then specifies what these conditions are, and it might reasonably be contended, that the dean and canons, taking the land and performing the conditions, were entitled beneficially to any surplus that might remain after the due performance of such conditions.

*Henry VIII.* died within a month after executing this will. Shortly after his decease, his successor, *Edward VI.*, shewed a desire to carry the intentions of his father into effect; and, on the 24th of *February*, 1547, he took the advice of his councillors, and of the Barons of the Exchequer, the King's Serjeant, and the Attorney-General and Solicitor-General, for the purpose of ascer-

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1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

taining in what manner he could best effectuate the wishes of *Henry VIII.*, and best bind the dean and canons, and their successors, to fulfil any obligations or conditions which might be imposed upon them. Accordingly, under the advice of his councillors, and the manner pointed out by the barons and the other learned persons who were consulted, *Edward VI.* made the grant in question, which is called "the new dotation." The documents constituting this grant, and evidencing the terms and conditions on which it was made, are three in number; they bear date respectively the 2nd of *August*, the 4th of *August* and the 7th of *October*, 1547. The first of those documents professes to be the particulars of grant by *Edward VI.* to the Dean and Canons of *Windsor*, the grantees. It is extracted from the records of the Court of Augmentation.—[*His Honor stated it, and the memorandum, see ante, p. 683.*]


It is a matter of some importance, in the consideration of this memorandum, that it does not contemplate the necessity of the execution by the dean and canons of the indenture, which is to be prepared, to set forth the ordinances by which they are to be bound. This will prove material, when we come to consider the deed not now forthcoming, alleged to have been executed by Queen *Elizabeth*.

The next document of the 4th of *August*, 1547, is the most important of the whole series. All the parties to this cause, as well as those who have an interest in the question to be here decided, must rely upon it, as indeed is admitted on all sides. This indenture is that which imposed on the Dean and Canons of *Windsor* the obligations which they had to perform, as the condition of the grant which they were about to obtain.

It



It is expressed to be made between the King of the first part; the executors of the will of *Henry VIII.* of the second part, and the Dean and Canons of *Windsor* of the third part; and it is duly executed by all the parties to it.—[*His Honor here stated it, see ante, p. 684.*]

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

The third of these documents is the letters-patent of the 7th of *October*, 1547, under the Great Seal.—[*His Honor stated the King's grant to the dean and canons of the hereditaments described in the indenture of the 4th of August, 1547, see ante, p. 686.*]

Those instruments constituted what is called “the new dotation.” The last instrument, which vests the property in the dean and canons, is made in consideration of the lands taken by *Henry VIII.* in performance of the promise contained in his will, and in performance of the covenants contained in the indenture of the 4th of *August* preceding. The considerations therefore (if I may so express myself) are marshalled between the two parts of the instruments, each applies to its particular portions; the lands worth 160*l.* 2*s.* 4*d.* are given in consideration of the lands of *Ivor* and *Damarye Court* taken by *Henry VIII.* The lands worth 600*l.* are given in consideration and in performance of the promise contained in the indenture of the 4th of *August*, 1547. And accordingly, that instrument, which I have fully stated, is that which must shew the character in which the dean and canons took the lands. There are obviously, therefore, two purposes prominently pointed out and kept distinct throughout these four documents, namely, the will of *Henry VIII.* and the three instruments of *Edward VI.* One is the restoration to the dean and canons of lands of equivalent value to those taken by *Henry VIII.*; the next is the grant of lands of the value of 600*l.* per annum,




1858.  
ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

annum, for the purpose to be specified and settled hereafter. That the dean and chapter took the hereditaments which corresponded in yearly value to the 160*l.* 2*s.* 4*d.* as their own property, to be held exactly as they held the hereditaments of *Ivor* and *Damarye* Court, as an equivalent for which they were given, is quite clear.

The question is, in what character the dean and chapter take the hereditaments, which produced, at the time of the grant, the 600*l.* per annum. If the matter stood on these documents alone, and if no subsequent deed had been executed, and if the question were wholly unaffected by any subsequent usage or mode of dealing with the property, I should entertain a clear opinion, that the dean and canons did not, from this grant alone, take any beneficial interest in this portion of the property, but that they took it upon trusts to be afterwards declared. It is true, that the word "trust" is not used in the operative part of the deed of the 4th of *August*, 1547, and I believe it is rarely, if ever, so used in the operative parts of instruments of that date, but the hereditaments are given to the dean and canons and their successors, for such uses, &c., mentioned in the last will, and of the maintenance and performance of the "ordinances, rules, acts and things" as hereafter shall be limited, &c. by an indenture tripartite.—[*See ante*, p. 684.]—And then the dean and canons covenant so to employ the rents.—[*See ante*, p. 685.]

How does this differ, in substance, from what would be the modern form of a conveyance to the dean and canons, to hold to them and their successors, upon such uses, trusts, intents and purposes as should be hereafter specified? To me they appear to be equivalent. Consistently, therefore, with all the cases, if such intents  
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and purposes were never afterwards specified, a resulting trust would exist in favour of the grantor. I think it unnecessary to refer to the cases upon this subject, all of which that are material are referred to in the case of *The Corporation of Gloucester v. Wood* (a). There a testator had given a sum of money to the Corporation for the purpose already mentioned, and he had not previously or subsequently stated any purpose whatever. The Corporation took the property impressed with the trust which was not specified, and consequently they were held to take no beneficial interest but to be trustees for the residuary legatees. The circumstance that the property here given is real estate instead of a personal property is unimportant. It is equally immaterial that the gift is made by deed instead of by will; it is equally immaterial that the giver is the King instead of a private individual. The same principle, in my opinion, affects all the cases, and they must all be governed by the same rule.

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

In reading this indenture, I see a marked distinction between the grant to the dean and canons for themselves beneficially, and the grant to them for the intents and purposes to be specified in an indenture hereafter to be made.

It is suggested, on behalf of the informant, that upon the face of this instrument, there appears to be a general dedication to charitable purposes; that if the matter rested here, instead of there being a resulting trust in favour of the grantor, there would be a general dedication of the property to charitable purposes; and that as it is a trust in favour of unknown charitable purposes, this Court will execute that trust, and settle a scheme

(a) 3 *Hare*, 131, and 1 *H. Lds. Ca.* 272.

1858.

ATT.-GEN.

v.

The DEAN  
AND CANONS  
OF WINDSOR.

scheme for that purpose. But I dissent from that view of the case. It is true, that there is to be observed, both in the will of King *Henry VIII.*, and in the discussions in the subsequent reigns as to the means of carrying *Henry VIII.*'s will into effect, a desire to effect a charitable object, but is a particular specified charitable object, namely, the support of the poor knights, and therefore if this indication of intention is to govern the deed of the 4th *August*, 1547, it would be a trust for the poor knights; if that object failed, there would be no purpose expressed in favour of the Charity generally, other than this particular one, which this Court could carry into effect. But the real answer appears to me to be, that this indication of intention does not alter or govern the deed of the 4th of *August*, 1547, which is not to be construed by parol evidence of the intent of the framers of it and those who were parties to it; but it must be construed as it stands, on the just meaning to be attributed to the word contained in it, and which grants the property to be held on trusts to be afterwards declared.

If, therefore, this case were untouched by any subsequent transaction or usage, I should be unable to discover, from the documents to which I have already referred, more than this :—that the hereditaments were granted to the dean and canons, in order that the rents might be employed for certain intents and purposes, to be afterwards specified by the King and the executors of *Henry VIII.*, but which was never done. The projected indenture, it is contended, was never, in fact, executed. This at least is clear, that no intent and purposes were ever specified by *Edward VI.* or by the executors of *Henry VIII.*, or the survivor of them.


What then is the effect of this? On the part of the  
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dean and canons, it is argued, that as no such contemplated instrument was ever executed, they took the property beneficially; but my opinion in that event is, (assuming that such contemplated indenture was never executed,) that a resulting trust would take effect in favour of the Crown, and that the beneficial interest in the property, according to the true and just construction of the instrument of the 4th of *August*, 1547, itself, was not finally and completely parted with by the Crown. And I should hold, if the matter rested here alone, that the *Solicitor-General* might properly contend that the Crown was entitled to a beneficial interest in these hereditaments.

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

The subsequent transactions, however, in my opinion, render this impossible, and the *Solicitor-General* has very properly not urged that case on behalf of her Majesty.

It becomes, however, highly important, to see whether the view which I take of the construction of the instrument was that put upon it by the parties to it themselves, and how far their acts and conduct are in accordance with or contradict this view. The conduct of the dean and canons, at the time of the execution of this grant and for a considerable length of time subsequently, contradicts the notion that they took the property beneficially. In the first place, they kept the accounts of the hereditaments belonging to the old and to the *new dotation* quite distinct; they set apart and carry over, as belonging to the *old dotation*, hereditaments sufficient to produce the 160*l.* 2*s.* 4*d.*, or rather they did, in fact, devote to this purpose hereditaments producing 2*l.* 4*s.* per annum more than was sufficient to answer the 160*l.* 2*s.* 4*d.*, and accordingly, in their book, they charged their lands with that sum of 2*l.* 4*s.* as payable to the object of the *new dotation*, and the rest

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

of the property granted by *Edward VI.*, and the rents accruing therefrom, they carry to the account of the *new dotation*.

Some inference might possibly have been derived from the circumstance, if the fact had been so, that during the interval which elapsed after the grant of the lands by the letters-patent in *October, 1547*, the rents and revenues of all the hereditaments, until the dedication of them to some charitable purpose, had been employed by the dean and canons for their own use and benefit; but as far as I can make out from the accounts, which upon the whole are carefully kept and well preserved, no portion of these revenues, or, if any, certainly a very inconsiderable portion, was taken by the dean and canons for their own purposes or beneficially, during the reigns of *Edward VI.*, of *Mary*, and of *Philip* and *Mary*, and during the beginning of that of *Elizabeth*, until the next transaction occurred, to which I shall presently refer. The income of the property seems to have been applied in building the new houses intended for the accommodation of the poor knights, and I think the extracts from the Ashmolean manuscript are admissible, and are *prima facie* evidence, at least, that the rents of the hereditaments were employed as therein described. But what is of still greater importance is, that the account of the rents received are duly rendered to the Crown, and audited by the proper officers of the Crown appointed for that purpose; and no sums of money seem to have been applied or retained by the dean and canons, which was not liable to be disallowed on the part of the Crown: accordingly reasons are urged by the dean and canons for the consideration of the lord treasurer, why particular items should be allowed; and during the whole of this period, not a suggestion appears in any document, not even in their

their own books, of any claim made by the dean and canons of a beneficial interest in these hereditaments belonging to the *new dotation*. It is justly observed, that the usage or the mode of keeping the accounts cannot alter the rights of the parties, but here the whole of this usage, the mode of keeping the accounts, the mode of rendering them, the mode of auditing them and the application of the revenues, all tend to confirm the construction which I deem to be the true construction of the deed of the 4th of *August*, 1547, when taken by itself, namely, that the dean and canons took these hereditaments for intents and purposes to be afterwards specified, and that unless under the specification of these intents and purposes, and to the extent so specified, they took no beneficial interest therein. If no valid specification of the intents and purposes was ever made, then, in my opinion, the dean and canons took nothing, but were bound to account to the Crown, as the grantor in whose favour a resulting trust existed. If a valid specification of these intents and purposes was made, then those are to be carried into effect.


In making these observations, I do not mean to prejudice any case that might arise, where an original endowment or declaration of trust is to be inferred from long and continued usage. That case does not occur here, where the original deeds are all presented and the usage is conformable with them.

This being my view of the case, I come now to consider the document called the deed of distribution of the 30th of *August*, 1559<sup>(a)</sup>, expressed to be made by Queen *Elizabeth* of the first part, and the dean and canons of the second part. The questions which have been much discussed before me are, first, whether this deed ever had

1858.

ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

(a) *Ante*, p. 687.

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

had any existence, as executed by the Queen. Secondly, whether, if it had, it was executed by the dean and canons; and thirdly, if not so executed, whether it had any validity or binding force on them.

As to the existence of the deed originally, and that it was executed by the Queen, I do not entertain the slightest doubt. The fact that a copy of it appears in the books of the dean and canons, purporting to be so executed; that they admitted the possession of it for a considerable period, and that all they disputed was, the binding character of it as against themselves, all clearly prove, in my opinion, the existence of such a document executed by the Queen; and the document produced from the *chapter house*, which appears to be an engrossment originally of the document in another form, never executed, but afterwards altered into the shape in which it appears in the copy contained in the book of the dean and canons, tends to confirm this view.

The next question urged, and which seems, from the reign of *James I.*, to have been always urged by the dean and canons as their principal ground of defence, is, whether the deed of *Elizabeth* was executed by the dean and canons, and, if not, whether it had any binding force as against them. If I thought that such execution of the deed was material, it would be difficult, in the state of the evidence before me as to the existence of this deed, to hold that it was not executed by the dean and canons. It is plain that they had the original in their possession, executed at least by the Queen, and that they made a copy of it in their books. Evidence is always to be taken most strongly against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this principle, although it exonerates



exonerates the present members from blame in that respect. It is true it is urged that this deed is lost, and that nothing of wilful suppression is to be presumed against the predecessors of the present corporation, and yet the circumstances undoubtedly require an explanation, which they cannot now receive. The claim of the poor knights to a larger participation in the income of the charity arose in the reign of *James I.*, and has been continued, at intervals, with greater or less activity, down to the present time. The dean and canons always thought this deed of Queen *Elizabeth*, if held to be binding on them, would establish the title of the poor knights. Whether this belief of theirs was correct or not in law is immaterial. That such was their conviction appears from the record of the proceedings before the Judges in the reign of *James I.*, and before Sir *Dudley Ryder* in the reign of *George II.* The dean and canons always disputed the validity of this deed as against them, and claimed to be entitled to the lands beneficially, under the grant of *Edward VI.* It would be, as they believed, a matter of great advantage to them if the deed were not forthcoming. It was their duty to preserve it carefully, and the questions respecting it were continually arising. I repeat, that if I considered the execution of that deed by the dean and canons as material for the decision of this case, I should hesitate much before I could, in this state of the case, assume the non-execution of it by them; but in truth I consider it wholly immaterial; and without such execution, I am of opinion that the deed of 1559 was binding to all intents and purposes on the dean and canons. If I am right in the construction which the deed of the 4th of *August*, 1547, bears, so far as the hereditaments of the *new dotation* are concerned, the dean and canons, under the grant of *Edward VI.*, took no beneficial interest in them, but took them on trust, as completely

as

1858.

ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

as if that word "*trust*" had been expressly used. Now these trusts, or as they are called in the instrument in question, these "intents and purposes," were to be specified in and by some further indenture afterwards to be executed. But it is admitted on all hands, that unless it be by the deed of distribution executed by Queen *Elizabeth* on the 30th of *August*, 1559, no such indenture was ever executed. That deed was either a valid deed, under the indenture of the 4th of *August*, 1547, declaring the "intents and purposes" for which the dean and canons were to employ the revenues of the *new dotation*, or it was not. If it was, the question is disposed of, because the deed contemplated by the indenture of *Edward VI.* of the 4th of *August*, 1547, has been duly executed, binding the dean and canons and their successors for all time. If it was not, then no deed was executed in pursuance of the direction contained in the deed of the 4th of *August*, 1547, and the resulting trust in favour of the Crown took effect, and then Queen *Elizabeth* might have resumed the hereditaments of the *new dotation*, or disposed of them as she pleased. She did so dispose of them by this deed of distribution of the 30th *August*, 1559, and it is wholly immaterial in what character, whether it be under the power contained in the deed of the 4th of *August*, 1547, or whether it be as a grant of the interest vested in her, by reason of the resulting trust arising from such powers having ceased. In fact, it appears to me to be obvious, that the question of a beneficial interest in the dean and canons, under the grant of *Edward VI.*, was never raised by them before the Queen, as indeed, in my opinion, it could not have been; and it appears clear, from the various documents and from evidence of greater or less degree of weight preserved in the British Museum, the Ashmolean Museum at *Oxford*, and, above all, their own books (all of which evidence is,  
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in my opinion, admissible, as having a bearing on the subject), that the dean and canons never, till the reign of *James I.*, claimed a beneficial interest in these hereditaments, but that they accepted and acted in accordance with the directions contained in the deed of distribution of Queen *Elizabeth*, for a considerable period of time, and indeed, so far as the fixed payments are mentioned in that deed, they are continued down to the present time and at this very day. The construction and effect of the deed of distribution are totally different matters, but the validity and binding effect of it appears to me incapable of being successfully contested at the present time. In truth, down to the present time, the whole question was supposed to turn on, whether, under the grant of *Edward VI.*, they took the hereditaments of the *new dotation* beneficially or merely as trustees, and this has been the point always urged and relied on by them. In the reign of *James I.* they contended for this, and rested their case upon it; their case was heard by Sir *James Popham* and Sir *Edward Coke* in 1605, but the facts were not investigated, and it was assumed that this assertion was correct, but it does not appear that the deed of *Edward VI.* was produced or examined. Exactly the same course was pursued by Sir *Dudley Ryder*, who made a most careful and elaborate report of the hearing before him on this subject. He seems to have thought, and both the dean and canons and the poor knights seem to have assumed, that if the deed of distribution of Queen *Elizabeth* was in force, the poor knights were entitled to an increased share of the rents of the property; and the sole point contested was, the validity of that instrument, which seems before Sir *Dudley Ryder* to have been treated as depending on the terms of the grant of *Edward VI.* under the deed of the 4th of *August*, 1547. That deed was not produced; it was alleged that it could not be produced, and in reality  
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1858.


ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

1858.  
 ~~~~~  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

it was not produced. The consequence was, that the beneficial grant of the hereditaments originally to the dean and canons, so strenuously asserted by them and which the will of *Henry VIII.* seemed to support, was not disproved by the poor knights, and under this impression, Sir *Dudley Ryder* made his decision, or rather his report, in favour of the dean and canons.

These concluding sentences of his report contain the essence of the whole matter:—"Upon the whole it appears, that the right of this demand of the poor knight is founded simply on the letters-patent of Queen *Elizabeth* and the book thereto annexed. But it appears, that the dean and canons had a right to the estate in question precedent to and wholly independent of the letters-patent, and it does not appear that the dean and canons ever executed any counterpart thereof, or acted under it, in respect of the payments therein directed, excepting the small quarterly sums of 2*s.* and 20*d.*, which being inserted among the rules for the government of the poor knights, by which the dean and canons were made, in effect, their visitors, and for their service in attending the solemn obits for their founders, may have been more easily submitted to, and as there has been this long acquiescence, both on the part of the poor knights and all others equally concerned in interest, except in one instance, where it was adjudged against their demand, I am humbly of opinion, that the dean and canons are not bound, by these letters-patent of Queen *Elizabeth*, to make the several payments directed by the ordinance contained in the book thereto annexed; and therefore, whatever might be the construction thereof, in case the dean and canons were bound by them, in respect of a distribution of the improved revenues, in proportion, among the particular objects of that dotation, which may be a very doubtful question,

question, yet I am humbly of opinion, that the poor knights have not made out a title to any share of those improvements."

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

He states, in a former part of his report, that he wished to see a copy of the deed of the 4th *August*, 1547, but that it was alleged it was not forthcoming. In truth, nothing could be clearer, than that if the grant of the hereditaments was originally made to the dean and canons beneficially, except so far as they were directed to pay sums out of the revenues by some instrument binding on them, the surplus rents and revenues belonged to the dean and canons, if the deed of Queen *Elizabeth* was valid, and the whole of those rents if the deed was invalid. But it is also equally clear, that if the dean and canons took the hereditaments originally as trustees, then, to the extent that such trusts have been validly declared, they are to be performed, and that as to all surplus, if any, they are trustees for the heirs and successors of the original grantor, *Edward VI.* In truth, however, the deed of distribution of Queen *Elizabeth* does dispose of the whole of the rents and revenues arising from the hereditaments of the *new dotations*. This, therefore, puts an end to any claim on behalf of the Crown, in what I may call its individual character, and therefore, if I am right in the opinion I have expressed, the question in this case resolves itself into a consideration of what is the true and proper construction to be put on the deed of Queen *Elizabeth*.

Before, however, I consider the question of construction, I must notice one point which was urged by the dean and canons, with considerable force, against that deed, which is, that the deed of Queen *Elizabeth* is not confined to the distribution of the revenues of the  
 lands

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

lands of the *new dotation*, but it disposes of the sum of 661*l.* 6*s.* 8*d.* annually, and it appears, from the accounts of the dean and chapter, that this was the total amount of rental in that year of *all* the hereditaments comprised in the grant to the dean and canons by the letters-patent of *Edward VI.*, and which lands, to the extent of 160*l.* 2*s.* 4*d.* at least, were confessedly the property of the dean and canons, they being purchasers of them for value, having given the lands of *Ivor* and *Dumarye Court* in exchange for them. It is certainly a matter of difficulty to explain how this deed of distribution proceeded to dispose of rent to this extent: the evidence on the subject is very meager. The rent in the year of the deed of distribution amounted only to 661*l.* 6*s.* 8*d.* a year, but when the grant was made they amounted to 812*l.* 12*s.* 9*d.*, and in the year before the deed of distribution they amounted to 815*l.* 11*s.* 11*d.*, and in the year after the deed of distribution they amounted to 817*l.* 5*s.* 9*d.*; besides which there is evidence that the dean and canons took fines for the leases they granted, whether at this exact period or not I cannot say; but, according to the view I take of this matter, these circumstances do not alter the view I expressed. I accede to the view expressed by the Chief Justice in the reign of *James I.* and by the Attorney-General in the reign of *George II.*; I think that the Queen's deed, unless executed or assented to by the dean and canons, was legally inoperative, so far as it extended to the distribution of the revenues of the hereditaments belonging to the dean and canons beneficially, that is, to the hereditaments which had been set apart and the rents of which had been carried over to the accounts of the *old dotation*; but that it was and is operative over the rents of the other property, and that if it were not so, the dean and canons would be but mere trustees of such property in favour of the Crown. I am of opinion, therefore, that  
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# CASES IN CHANCERY.

although this fact is established, and though no sufficient elucidation of this subject is to be found in the evidence before me, still that, so far as regards the lands of the *new dotation*, this circumstance can have no effect, except so far as it may affect the construction of the deed.

185  
  
 ATT.-C  
 v.  
 The D  
 AND CA  
 OF WIN

The deed itself was obviously intended as an expression of the intents and purposes referred to in the deed of the 4th *August*, 1547. It recites that the poor knights were a principal object of the bounty of their predecessors, and it proceeds to distribute annually sums out of the rents, for the purpose of effectuating this object, and the deed then disposes of the residue of the rents in the manner specified. It has, as I have already observed, been constantly acted upon in the following manner:—The rents of the hereditaments set apart to answer the 160*l.* 2*s.* 4*d.* have been deducted as belonging to the *old dotation*, the sum of 52*l.* 10*s.* 5*d.* has been paid to the Crown in lieu of tenths and first fruits, a portion has been applied in making the fixed payments specified in the deed of distribution, and the residue has been divided amongst the Dean and Canons of *Windsor*, as being a part of their possessions. I think, therefore, that the circumstance, that the deed professes to deal with the rents and revenues of the whole of the hereditaments, though it suggests various hypotheses to explain how that circumstance has arisen, does not render the deed invalid. All that it does is to introduce this consideration into the construction to be given to the deed: namely, that Queen *Elizabeth* made no distinction between one class of the revenues and the other class arising from the hereditaments granted, but she directed the application of both; whether with or without the assent of the dean and canons themselves I know not.

Coming

1858.

ATT.-GEN.  
v.  
The DEAN  
AND CANONS  
OF WINDSOR.

Coming now to the consideration of the effect of the deed itself, as affecting the revenues of the hereditaments producing the 600*l.* per annum, and called the *new dotation*, it is to be observed that the poor knights are the principal objects of the bounty of the Crown and the institution of the charity; the whole of the transaction and the evidence which I have referred to shew this; the promise of *Henry VIII.*, the grant of *Edward VI.*, the application of the revenues in the building of residences for them, the appointment of nine knights by Queen *Mary* and four more by *Elizabeth*, and then the recital by the deed itself, all establish this fact. For this purpose, so expressed, she directs the dean and canons and their successors for ever, not only to cause her ordinances and rules to be observed, but also to bestow the rents, issues and profits of the hereditaments to such uses and intents as is thereafter declared. The deed then contains a series of ordinances, all apparently pointing to the support of the poor knights, and how they are to proceed, and by what rules they are to be bound; and it then contains "the Queen's Majesty's Ordinances for the continual Charges," amounting altogether to 430*l.* 19*s.* 6*d.* Of those fixed payments 288*l.* 6*s.* 4*d.* are for the poor knights, 95*l.* 19*s.* 10*d.* for the dean and canons, clerks, choristers and officer belonging to them, 20*l.* for four quarters' dole, and 26*l.* 13*s.* 4*d.* for the support of two scholars at *Oxford* and two at *Cambridge*. Certainly, therefore, to this extent, pointing out, that both the dean and canons and their officers are to paid by fixed salaries as well as the poor knights, but giving the knights a much larger share. She then disposes of the residue in these words:—"And the residue, being 231*l.* 6*s.* 8*d.*, to remain for the vicar's and serving priests' wages, when need requireth, reparation of the said lands, the officers' fees, and for the relief of the said dean and canons and their successors."

It



It might seem naturally to follow, from the whole case and the observations I have made, that I was about to make a decision in favour of the poor knights, but that is not so; nor is it necessary for me to consider, what would have been my view of this case, if it had been presented to a Court of Equity some years back. But upon a full consideration of the deed before me, I am of opinion, that upon its construction, I cannot arrive at that conclusion. I abstain, therefore, from entering into any detailed discussion as to the effect of the final provisions in the deed and of the deed itself, or into an examination of the previous decisions on this subject. The view that I have taken of similar cases is expressed in the observations I made in determining the *Beverley Case* (a), which was afterwards taken to the Lords Justices (b) and the House of Lords (c). But on reading and carefully considering the judgment of the House of Lords in that case, I am of opinion that it clearly governs the present, and that all the observations of their Lordships, in giving judgment, are applicable to this deed of distribution; in fact, in my opinion, the *Beverley Case* was a considerably stronger case than the present. The decisions of the House of Lords are binding on me and upon all the Courts except itself, and the Lord Chancellor, indeed, in his judgment, introduces a special warning to the inferior Courts, reminding them of their duty to follow that decision. The House of Lords alone can, if it thinks fit, decline to apply the principle of that case to the present. I forbear going further into this case. I follow the expressions used by Sir *Dudley Ryder*, in saying that the question is one of very considerable difficulty and nicety; but I think that it is clearly and plainly governed by the latter

1858.

ATT.-GEN.

v.

The DEAN  
AND CANONS  
OF WINDSOR.(a) 15 *Beav.* 540.(b) 6 *De G., M. & G.* 256.(c) 6 *House Lds. Ca.* 310.

1858.  
  
 ATT.-GEN.  
 v.  
 The DEAN  
 AND CANONS  
 OF WINDSOR.

latter decision in the House of Lords. The consequence is, that the dean and canons must be declared entitled to the surplus of the rents, and that the whole of the income arising from the hereditaments (whatever might have been the intention of the grantor of these hereditaments and the founder of this institution) is applicable as the income of the dean and canons (except so far as they have been diverted by Act of Parliament to the Ecclesiastical Commissioners).

I have already stated, that in my opinion, no decision could be made in favour of the information, depending on a general dedication to charity. In truth, I think, that upon carefully considering this case and the evidence before me with the pleadings, I perceive, that the information was first filed, on the assumption that if the deed of distribution were established, the poor knights would be entitled to a considerable increase in their salary; and that the case was, to a certain point, prepared and got up with this view, and which seems to have been taken in the time of *James I.* and also in the time of *George II.*, and which the dean and canons then endeavoured to repel, by setting up a beneficial grant in their own favour, and which, the production of the deed of the 4th of *August*, 1547, in my opinion, destroys; but that the decision of the House of Lords in the *Beverley Case*, pending the progress of this suit, has made it impossible to maintain this view of the case, and that consequently this suggestion of a general dedication to charity has been brought forward for the purpose, if possible, of maintaining the case of the information. I think that this is not possible, and that the information must be dismissed, of course without costs, as it is *ex officio*, but in no case should I have considered this a case for costs.

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NOTE.—An appeal is pending.

AN  
INDEX  
TO  
THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

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**ABATEMENT.**

One of several co-Plaintiffs was dead at the date of the decree, and the suit had in consequence abated. On motion, the representatives appearing and submitting to be bound, the Court revived the suit, and authorized the surviving Plaintiffs to prosecute the decree. *Smith v. Horsfall.* Page 331  
**See CREDITORS' SUIT.**

**DISMISSAL FOR WANT OF PROSECUTION.**

**ABSOLUTE INTEREST.**

A testator gave a fund to *A.* for life, and afterwards to his surviving children, but if he died without any, he gave one-half of it "to be disposed of as *A.* should think  
VOL. XXIV.

proper." The son never married. Held, that he took an absolute interest in the one-half, and not a life interest, with a power of appointment. *In re Maxwell's Will.*  
Page 246

**ACCOUNT.**

A large shareholder was the manager of the affairs of a company. He rendered accounts regularly from 1826 to his death in 1851. These accounts were not challenged in his life, but after his death items exceeding 2,000*l.* a year were questioned by the company, for which no vouchers could be produced, and no satisfactory explanation given. The account was opened for the whole period of

twenty-five years, and it was directed to be taken with special directions. *Stainton v. Carron Company.* Page 346  
*See Costs, 3, 4.*

#### ACCOUNTANT-GENERAL.

Accountant-General ordered to pay the income of a fund in Court to the vicar of S. for the time being. *In re Pearce.* 491

#### ACQUIESCENCE.

*See MORTGAGE, 1.*

#### ADMINISTRATION.

*See Costs, 2, 5, 8, 9.*

##### EXECUTOR.

LEGAL PERSONAL REPRESENTATIVES.

#### ADMINISTRATION SUIT.

*See Costs, 2, 5, 8, 9.*

#### ADVANCEMENT.

1. A sum of Consols, invested by a father in the names of his two daughters, held, under the circumstances, to form part of his estate, and not to be an advancement to them. *Bone v. Pollard.* 283
2. A father purchased a copyhold, and was admitted thereto to hold during the lives of his three children, A., B. and C. successively. B., after the death of the father and A., got admitted, whereupon the Plaintiff, who claimed under the father's will, instituted a suit to have B. declared a trustee for him. As an excuse for not proceeding at law, the Plaintiff alleged

a custom of the manor, by which the *custui que vie* was entitled to be admitted; this was disputed. Held, that even assuming the custom, still, by the form of the grant, the father had made an advancement to his sons, who were therefore entitled beneficially, and not as trustees for their father. *Jeans v. Cooke.* Page 513

3. The evidence to rebut the presumption of an advancement, in the case of a purchase by a father in the name of a child, ought to be distinct and contemporaneous. *Ibid.*

#### AFFIDAVIT.

*See EVIDENCE.*

#### AGENT.

1. Observations as to the necessity of an agent preserving his vouchers. *Stainton v. Carron Company.* 346
2. Distinction between the cases where the business of a company is conducted by a mere agent, and where it is managed by a shareholder, who is a *quasi* co-partner. *Ibid.*

#### AGREEMENT.

1. A. agreed to take B. as his servant, "at such wages as might from time to time be agreed on," and B., on his part, agreed to serve A., and not to set up trade for himself within certain limits. B. accordingly entered into and continued in A.'s service, at wages agreed on. Held, that there was

a good and valuable consideration to support the agreement as against *B.*, and the Court enforced it. *Benwell v. Inns.* Page 307

2. A milkman, carrying on business in three places, took the Defendant into his service. The Defendant engaged, as regarded the milkman, his assignees and successors, not to carry on a similar trade within certain limits. *A.* sold his branch business at one of the three places to the Plaintiff, who retained the Defendant in his service. Held, that the Plaintiff, as assignee and successor of part of the business, was entitled to the benefit of the Defendant's contract. *Ibid.* See RAILWAY.

#### ALIEN.

1. This Court will enforce, for the benefit of the Crown, a trust of real estate created in favour of an alien. The devise being valid, and there being a *cestui que trust*, who can take but not hold, the Crown becomes entitled beneficially, and not the trustee or heir at law. *Ritson v. Stordy* (3 *Smale & Giffard*, 230) dissented from. *Barrow v. Wadkin.* 1
2. The words in the 13 *Geo. 3*, c. 21, s. 3, are to be read "aliens' duties, customs, and impositions," and not "aliens, duties, customs, and impositions," and therefore the grandchild of a natural born subject, born out of the queen's allegiance, is entitled to the benefit of that statute, in regard to holding lands as a natural born subject,

although he has not complied with the formalities specified in the third section. *Barrow v. Wadkin.* (No. 2.) Page 327

#### ANNUITY.

An annuity held payable out of the interest only of a fund, and not out of the *corpus*, and to fail upon a deficiency of the income. *Earle v. Bellingham.* (No. 1.) 445

#### ANSWER.

See DISCOVERY.

#### APPOINTMENT.

1. Hereditaments were, by deed of 1836, conveyed to a trustee for sale, the produce to be held as *A.* and *B.* should appoint. Part of the property was taken by a railway company, and the purchase-money was laid out in the purchase of cottages, which, in 1850, were conveyed to the trustee. In 1851, by deed poll, reciting that, by the settlement, the property (describing it) had been conveyed to the uses above mentioned, *A.* and *B.* appointed all the moneys to arise from the sale of the aforesaid hereditaments, and the said hereditaments until such sale. Held, that the cottages were not included in the appointment. *Collinson v. Collinson.* 269
2. A testatrix, having a power over a sum of money, appointed it to *A.* and *B.* on certain trusts, and she also gave them on trust her residuary personal estate, after payment of her debts. She made

no beneficial bequest of her residue, and appointed two other persons her executors. The trusts declared of the appointed fund did not exhaust it. Held, that the surplus fell into the residue, and did not pass as unappointed. *Le-fevre v. Freeland.* Page 403

3. *A. B.* had, under her father's will, a power to appoint 10,000*l.* By changes in the investment, the fund had increased to 11,495*l.*, of which 10,000*l.* was lent on mortgage to *C.*, and 1,495*l.* on mortgage to *A. B.* By her will, after reciting the power in her father's will to appoint 10,000*l.*, *A. B.*, in exercise of her power, appointed "the said sum of 10,000*l.* now secured on mortgage of *C.*'s estate, and any other moneys representing the same." Held, that the whole 11,495*l.* was well appointed. *Ibid.*

#### ATTACHMENT.

See MESSENGER.

#### ATTORNEY AND CLIENT.

1. An attorney has not, by virtue of his office, an implied authority to compromise an action; but a client may become bound by a compromise entered into by his attorney without his authority, by not repudiating it within a reasonable time. *Swinfen v. Swinfen.* 549
2. At the trial of an issue counsel agreed upon terms of compromise, and it was made a rule of the Court of Common Law. The compromise was unauthorized by the Plaintiff, and effected without

the instructions of his attorney. There being no subsequent acquiescence, a bill by the Defendant in the action, for specific performance of the compromise, was dismissed. *Swinfen v. Swinfen.*

Page 549

#### AUTHORITY.

See ATTORNEY AND CLIENT.

#### BANKER.

A fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone they, in 1843, transferred it to his account, and thereby obtained payment of a debt due from him to them. Held, that the trustees might sue the bankers in this Court to have the trust fund replaced, and that the Statute of Limitations was inapplicable. *Bridgman v. Gill.* 302

See MORTGAGE, 3.

NOTICE, 4.

SET-OFF.

#### BEQUEST.

A testator bequeathed an annuity of 100*l.* to his daughter while sole, but on her marriage, and on some adequate provision made by some settlement for her life, and to the use of her issue, which he directed should be made, he bequeathed to her 2,500*l.* In default of such issue, he bequeathed that sum "to

the children of his son." The daughter had one child only, who died in her lifetime, of tender years. Held, that the gift over to the children of the son altogether failed. *Findon v. Findon*.

Page 83

See IMPLICATION.

SUBSTITUTIONAL GIFT.

VESTING.

WILL and its references.

BILL FOR ACCOUNT.

See COSTS, 3, 4.

BILL OF EXCHANGE.

See INTEREST, 1.

BOND.

See SET-OFF.

BREACH OF TRUST.

1. A testator, who died in 1841, directed his trustees to sell his real estate, and giving them some discretion therein. Instead of selling, they mortgaged, and retained the estate. Held, that they had committed a breach of trust, and the estate having become depreciated, that they were liable for the loss. Held, also, that the mortgage was void as against the mortgagee with notice, but that he was entitled to stand as a creditor on the produce of the estate, to the extent to which the mortgage money had been properly applied. *Decaynes v. Robinson*.

86

2. Where a loss occasioned by a breach of trust does not happen

until after the death of the trustee, his assets are equally liable.

*Decaynes v. Robinson*. Page 86

3. Under a will, a trustee held an aggregate fund in trust, as to one-third each for *A.*, *B.* and *C.* respectively for life, with remainder to their respective children. He, without any authority under the will, transferred one-third of the fund to the trustees of the respective settlements of *A.*, *B.* and *C.* The share of *B.* having been dissipated by her trustees, held that *B.*'s children were entitled to participate in *A.*'s third, which was still remaining in her trustees' hands. *Browne v. Butter*. 159

See BANKER.

DIRECTORS.

BROKER.

See FRAUD.

BUILDING LEASE.

See FORFEITURE, 1.

BURIAL GROUND.

1. The mortgagee of a burial ground has notice of the purposes to which it is devoted, and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor, while left in possession. *Moreland v. Richardson*. 33
2. In 1831, a chapel and a burial ground adjoining were mortgaged. The mortgagors remained in possession, and afterwards, in 1833, graves were sold in perpetuity to different persons, without the concurrence of the mortgagees. The

burial ground was closed by an order of the Queen in Council, and the mortgagees thereupon began to level the ground and deface and destroy the tombstones &c. The Court held, that the mortgagees were bound by the rights granted, and restrained them from doing any act which would prevent the future interment in the family graves, with the permission of the Secretary of State, and from removing or injuring the graves or the tombstones, and ordered the mortgagees to replace those which had been removed. *Moreland v. Richardson*. Page 33

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#### CANAL.

See COMPULSORY POWER.

#### CHAMBERS.

A party interested, being summoned to appear as a witness, is not justified in refusing to be sworn before the Chief Clerk, on the ground that he will not be able to have the assistance of Counsel before the Chief Clerk, and that he ought, therefore, to be examined before the Judge or the Examiner. *In re the Electric Telegraph Company of Ireland*. (No. 2.) 137

#### CHARGE ON REAL ESTATE.

See DEMONSTRATIVE LEGACY.

NOTICE, 1, 2, 3.

#### CHARITY.

1. Property was devised to the town

and commonalty of *Grantham*, for the discharge of the tax of the commonalty to the king for ever. The tax referred to was unknown, and the income had been applied to the use of poor freemen and their widows. Held, that this application was improper: that this was a charity property belonging to the town generally, and not to the corporation beneficially; and a scheme was directed. *The Attorney-General v. Bushby*.

Page 299

2. Where property is given for charitable purposes which do not exhaust the whole income, one rule is, that this, *primâ facie*, is an indication of intention to benefit the donee. *The Attorney-General v. Trinity College, Cambridge*. 383
3. In charity cases the cotemporaneous acts of a donor are of importance for the purpose of putting a construction upon the instrument of gift, but the cotemporaneous acts of the donee are only valuable as shewing the intention and view of the donee in accepting the gift. *Ibid*.
4. When property is given for charitable objects which do not exhaust the whole income, and the question is as to the right of the donee to the surplus, the case is varied where the donee is a charity, from that where the donee is a trading corporation. *Ibid*.
5. In 1558, a testator devised real estates, which he described as of "the clear yearly value of four-score pounds or thereabouts," to



*Trinity College, Cambridge*, "to their only proper use and behalf," to the intent following, "with part of the rents" to keep, find and maintain three grammar schools, and pay every master 13*l.* 6*s.* 8*d.*, and "with part of the rents keep, &c. a chaplain, and pay him 13*l.* 6*s.* 8*d.*," and he directed other charitable payments. At the testator's death the rents exceeded these specific payments by 1*l.* 6*s.* 8*d.* The rents having greatly increased, the Court, on a critical examination of the will, came to the conclusion, that after providing for the charitable objects, the college was entitled to the surplus rents. *The Attorney-General v. Trinity College, Cambridge.* Page 388

6. Trustees had the option of establishing a charity in either of two ways, the one valid, and the other invalid. The fund was ordered to be paid to them without any undertaking as to the mode in which they would apply it, and without any declaration or direction of the Court on the subject. *The University of London v. Yarrow.* 472
7. The Military Knights of *Windsor* held entitled to nothing beyond the fixed payment given them by the original foundation, and to have no interest in the increase of the surplus rents. *Attorney-General v. The Dean and Canons of Windsor.* 679
8. Lands of the annual value of 661*l.* 6*s.* 8*d.* were conveyed to the Dean and Canons of *Windsor*, for the maintenance of specified cha-

ritable purposes, amounting to 430*l.*, including thence a fixed payment to the Dean and Canons, "and the residue, being (as the document stated) 231*l.* 6*s.* 8*d.*, to remain for the vicar's and serving priest's wages, and, when need requireth, reparation of the said lands, the officers' fees, and for the relief of the said dean and canons and their successors." The rental increased to about 14,000*l.* a year. Held, on the authority of *The Attorney-General v. Beverley*, that the dean and canons took beneficially the whole surplus rents, after paying the fixed charges. *Attorney-General v. The Dean and Canons of Windsor.* Page 679  
*See* LEGACY-DUTY.

#### CHIEF CLERK.

*See* CHAMBERS.

#### CLAIM.

At the hearing of a claim, the Plaintiff was ordered to bring the representatives of a deceased person before the Court. Not having done so, the Defendant, after considerable delay, moved to dismiss. Held, that the proper order was, that the Plaintiff should comply within a fortnight, or, in default, that the claim should be dismissed. *Pearce v. Wrighton.* 253

#### COMPANY.

*See* ACCOUNT.

#### COMPROMISE.

*See* ATTORNEY AND CLIENT.

**COMPULSORY POWER.**

A canal company had, under their act, compulsory powers of taking land. In 1797 they took the lands of Lord *W.*, an infant, and the value was assessed by the commissioners at a fixed rent of 14*l.* a year. The proceedings, however, were informal and not binding on the parties. The infant attained twenty-one in 1806, and from that time a rent had been paid by the company, varying from an' not founded on that mentioned in the award. The representatives of *A. B.* had recently threatened to eject the company. The Court held, that though the company was not entitled to a conveyance on the ground of the adoption and long acquiescence in the award, still, whether the compulsory powers had expired or not, the company were entitled to take the lands, upon payment of a proper compensation, in accordance with the decision in *The Duke of Beaufort v. Patrick*, 17 *Beav.* 60. *The Somerset Coal Canal Company v. Harcourt.*

Page 571

*See Costs*, 7.**CONDITION.***See Forfeiture.***CONSTRUCTION.**

A testator made a voluntary settlement of some real estates. He afterwards by his will devised other real estates to nearly the same uses. Held, that the deed

could not be referred to for the purpose of construing the will. *Randall v. Daniel.* Page 193

*See ALIEN*, 2.**BEQUEST.****CONTRIBUTION.****DEBT.****DEVISE.****FORFEITURE.****LIFE INTEREST.****PRINCIPAL AND SURETY**, 1.**WILL.****CONTEMPT.***See Messenger.***CONTINGENT LEGACY.**

The testator directed the interest of his residue to be applied to the maintenance and support of his son and his son's wife and children, and after the death of the survivor of his son and wife, he directed such interest to be applied, by his executors, in the support of and bringing up the child or children of his son during their minority or minorities, and as they severally attained the age of twenty-one years he gave and bequeathed the share of each child to be paid to her or him, and in case only one of such children should live to attain the age of twenty-one years, then he gave the whole to such one child absolutely. Held, that the gift to the children was contingent on their attaining twenty-one. *Tracy v. Butcher.* 438  
*See DEVISE*, 1, 2.

**CONTRIBUTION.**

By the decree the estates of two

deceased trustees were declared severally liable to replace a fund. The representatives of one only admitted assets, and the decree directed payment by them, and an account of the estate of the other. The whole being paid by the former, held, that their right to contribution against the estate of the latter constituted a mere simple contract debt, although as against both estates, the demand was a specialty debt. *Priestman v. Tindall*. Page 244

#### CONTRIBUTORY.

1. A father voluntarily transferred shares in an incorporated company to his infant son. The company was afterwards wound up (the son being still an infant). Held, that the father was a contributor. *Reid's Case*. 318
2. A father applied for shares in a company in the name of his son, and he paid the deposit; the company, however, refused to allow him to execute the deed on behalf of the son. Having done no further act, Held, that the father was not a contributor. *Maxwell's Case*. 321
3. Provisional directors entered into an agreement to give *A. B.*, the projector, 2,500*l.* in money, and 2,500*l.* in paid-up shares. The agreement did not appear in the deed of settlement which *A. B.* had executed for 350 of those shares. Held, that the company were not bound by the agreement, and although they repudiated it,

still that *A. B.* was liable unconditionally as a contributory in respect of the 350 shares. *Nickoll's case. Re The Cosmopolitan Life Assurance Company*. Page 639

#### COPYHOLD.

1. A copyhold was devised to *A.* for life, with power afterwards to the executors to sell. *A.* was admitted, and after her death the executors sold to *B.* *B.*, before admittance, devised the copyholds. He was afterwards admitted, and died without republishing his will. Held, that (under the old law) *B.* at the date of his will had an equitable and devisable interest, and not an inchoate legal right, and secondly, that the devise was not revoked by his subsequent admittance. *Seaman v. Woods*. 372
2. By agreement between the lord and the copyholders, waste lands of the manor were enclosed and allotted. Held, that the allotments taken by the copyholders were of freehold tenure. *Payne v. Ryder*. 151  
See ADVANCEMENT, 2.

#### CORPORATION.

See RAILWAY, 2, 3.

#### CORPUS.

See ANNUITY.

TENANT FOR LIFE AND REMAINDERMAN.

#### COSTS.

1. The Defendant, a purchaser, or-

- dered to pay all the costs, though a good title was not shewn until after the institution of the suit, by the production of a declaration which was not the cause of dispute, and had not been previously required. *Bridges v. Longman.* Page 27
2. An alleged creditor carried in a claim, in an administration suit, for a debt alleged to be due from the testator. The claim having been disallowed, the claimant was ordered to pay the costs of the proceeding. *Yeomans v. Haynes.* 127
3. In a bill for an account, the costs were given to the Plaintiff, although a balance of 2,000*l.* was found due from him to the Defendant, the Plaintiff having succeeded in the substantial matters of litigation. *May v. Biggenden.* 207
4. Principles on which the costs of a suit for an account are regulated. *Ibid.*
5. A creditor's suit having been instituted after a statement by the legal personal representatives that there were no assets, which statement turned out to be true, the Plaintiff was ordered to pay the costs. *Fuller v. Green.* 217
6. A Plaintiff had required the attendance of a Defendant to be cross-examined on his affidavit. He attended, but it was held that he was entitled to his expenses as a witness. The Plaintiff then abandoned this course of proceeding, and filed interrogatories for the Defendant's examination. Held, that this could not be done until the costs of the former proceeding had been paid. *Davey v. Durrant.* Page 411
7. An act, enabling a public body to take lands compulsorily, directed that in cases of disability, the purchase-money should be paid into Court and laid out in the purchase of other hereditaments, and that in the meantime it should be invested in Consols and the dividends paid to the persons entitled. The act authorized the Court to order "the expenses of all purchases from time to time to be made in pursuance of the Act" to be paid by the public body. Held, that the costs of the interim investment in Consols, and of the order to pay the dividends to the tenant for life, must be borne by the fund, and not by the public body. *In re Gould.* 442
8. A testator devised part of his real estate in trust for sale to pay his debts "and the costs and charges of proving and attending the execution of his will and the several trusts therein contained." Held, that the costs of an administration suit were charged upon this estate. *Alsop v. Bell.* 451
9. Trust moneys were lent on mortgage to the tenant for life. On his death a suit was instituted mainly for the administration of his estate and also the realization of the mortgage, and involving the execution of the trusts of the settlement. Held, that the costs ought to be paid as of an adminis-

tration suit out of the assets ; but that the costs, so far as they had been increased by its being a suit for the execution of the trusts of the settlement, must be borne by the settlement fund. *Irby v. Irby*.

Page 525

10. A Plaintiff is not justified in adding persons as Defendants to a suit, merely because the original Defendant insists, by his answer, that they are necessary parties. Persons so added, having been dismissed, the Plaintiff was ordered to pay the costs. *Williams v. Page*. 654

11. The Plaintiff, a second mortgagee, obtained the costs of so much of a suit for redemption as had been incurred by the Defendants, the first mortgagees unsuccessfully disputing his rights to redeem. But the Court, instead of ordering those costs to be paid to the Plaintiff personally, directed them to be set off in case of the Plaintiff's redeeming. *Wheaton v. Graham*. 483

See CROSS-EXAMINATION.

DISMISSAL, 1.

MORTGAGE, 3.

TAXATION.

TRUSTEE.

#### COUNSEL.

See CHAMBERS.

#### COVENANT.

See EXECUTOR, 1, 2, 3.

WAIVER, 1.

#### CREDITOR.

See COSTS, 1.

DEBT.

EXECUTOR, 4, 6.

#### CREDITORS' DEED.

1. It is not, in equity, necessary that a creditor should execute a creditors' deed, if he do some act which amounts to acquiescence he is entitled to the benefit of it. But it is not sufficient for him merely to stand by and take no part in the matter. *Biron v. Mount*. Page 642
2. Creditors who have not acceded to a creditors' deed before the debtor has taken the benefit of the Insolvent Debtors' Act, cannot afterwards come in and claim the benefit of it. *Ibid*.
3. Held, on the construction of a creditors' deed, that the dividends which the creditors would have been entitled to, if they had acceded to the deed, passed, on their default, to the debtor, and to his assignee under a subsequent insolvency. *Ibid*.

#### CREDITORS' SUIT.

After decree in a creditors' suit the Plaintiff died, leaving no personal representative. The Court refused to allow the suit to proceed upon the motion of the accounting parties, but offered to do so if a creditor applied. *Johnson v. Hammersley*. 498

See COSTS, 2.

**CROSS-EXAMINATION.**

A party to a cause, upon being cross-examined on his affidavit, is entitled to be paid his reasonable expenses by the party cross-examining him, in the same way as a witness under the 15 & 16 Vict. c. 86, s. 38. *Davey v. Durrant*.  
Page 493

See COSTS, 5.

EVIDENCE.

WILL.

**CROWN.**

See ALIEN, 1.

**CUSTOM.**

See ADVANCEMENT, 2.

**DEBT.**

In 1844, *A. B.* agreed to give to his creditor a security on the debt then due, "or which might thereafter become due to him" from a company. This was carried into effect by a deed in 1845, which, after reciting the agreement, assigned all sums claimed to be due, and which he might thereafter recover. Held, that the deed passed all sums due at its date, but nothing subsequent. *Scott v. Scott*.  
263

See COSTS, 2.

PHYSICIAN.

SPECIFIC BEQUEST.

**DECREE.**

Special decree for taking a general account, with a direction to treat the books as conclusive, except as

to items challenged within six weeks, with liberty to surcharge and falsify. *Stainton v. Carron Company*.  
Page 346  
See ABATEMENT.

**DEED.**

See APPOINTMENT, 1, 3.

CONSTRUCTION.

CREDITORS' DEED.

DEBT.

**DEMONSTRATIVE LEGACY.**

A testatrix having a power of appointment over her late brother's property, subject to the life interest of *A.*, by her will gave some legacies "out of her own personal estate," payable immediately after her decease, and other legacies "out of her brother's estate," payable on the death of *A.* She directed the duty on all the foregoing legacies to be paid, and charged them on the real estate. By a codicil she directed the second legacies to be paid immediately after her own death, and gave other legacies. Held, that on the will the second legacies were specific, but that on the codicil they were demonstrative. Held, also, that all the legacies by the will and codicil were charged on the real estate, and payable duty free. *Williams v. Hughes*.  
474

**DEPOSIT.**

See EQUITABLE MORTGAGE.

**DEVASTAVIT.**

See EXECUTOR.

DEVISE.

1. A devise, commencing with the word "Likewise," held to be subject to the contingency mentioned in the preceding gifts of the same estate. *Paylor v. Pegg*. Page 105
2. A testator devised an estate to his son until he attained twenty-one, and to the testator's widow for life, in case his son died under twenty-one. This was followed by a gift of the produce of the estate to his nephews, which commenced with the word "Likewise." Held, upon the context, that the gift to the nephews was governed by the same contingency as that to the widow, and the son having attained twenty-one, that the gift to the nephews failed. *Ibid*.
3. The settlor conveyed real estate to trustees in fee, to the use of *A.*, *B.*, *C.* and four others successively, for life, and afterwards upon trust to convey to all and every the sons and daughters of the eight tenants for life, "who should be then living, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail," the sons and daughters of *A.*, and their heirs, to take before all the other persons named, and the sons and daughters of *B.*, and their heirs, to take next after the sons and daughters of *A.* and their heirs (and similar as to the five others in succession). And the sons of *all and every the persons* last above named and the heirs, &c. to take before the daughters and their heirs. Held,

that the daughters of *A.* took in priority of the sons of *B.* *Randall v. Daniel*. Page 193

See EXECUTORY TRUST.

VESTING.

WILL and its references.

DIRECTORS.

The Plaintiff agreed to sell a colliery to a joint-stock company for 8,000*l.* in paid-up shares; but there was a private arrangement, not communicated to the shareholders, that 2,500*l.* of these should be given as a bonus to the directors. Held, that the Plaintiff could not sustain a bill for specific performance. *Maxwell v. The Port Tennant Patent Steam Fuel and Coal Company*. 495

See CONTRIBUTORY, 4.

PUBLIC COMPANY.

DISCOVERY.

1. Unless a Defendant plead to the discovery, he is bound to answer fully. *Reade v. Woodrooffe*. 421
2. When substantial information is given by the answer, the Court discourages exceptions for insufficiency, and will not require minute and vexatious discovery. *Ibid*.
3. The bill required discovery and accounts from *July*, 1850, of dealings between the Plaintiffs and Defendants. A Defendant, by his answer, stated that they had terminated, by consent, in *February*, 1851, and he refused to set out the subsequent matters. Held, that he was bound to do so. *Ibid*.

### DISMISSAL FOR WANT OF PROSECUTION.

1. An order was made to dismiss, in default of the Plaintiff filing a replication within fourteen days, but nothing was said as to the costs of suit. The Plaintiff filed a replication a few days after the time appointed. On a subsequent application, the Court dismissed the bill, and with costs. *Stephenson v. Mackay.* Page 252
2. The Plaintiff set down the cause, but neglected to serve a *subpœna* to hear judgment within time. The cause became afterwards abated by the death of a Defendant. Held, under these circumstances, that an order to dismiss was regular. *Williams v. Page.* 490  
See CLAIM.

### DIVIDENDS.

See TENANT FOR LIFE AND REMAINDERMAN.

### DOWER.

A husband was seised in fee, subject to a trust term to secure life annuities and to pay him half the surplus rents. Held, that his widow was entitled to have her dower set out at once. *Sheaf v. Case.* 259

### ECCLESIASTICAL COMMISSIONERS.

The Ecclesiastical Commissioners held entitled to no greater rights in the suppressed canonries, under the 3 & 4 Vict. c. 113, than the

former canons were, and to be subject to the same trusts. *Attorney-General v. Dean and Canons of Windsor.* Page 679

### ELECTION.

Heir at law held, under the circumstances, not put to his election. *Seaman v. Woods.* 372

### ENJOYMENT IN SPECIE.

See LONG ANNUITIES.

### PERISHABLE PROPERTY.

### EQUITABLE MORTGAGE.

Adjoining premises (X. and Y.), were respectively conveyed to a testator by deeds of 1840 and 1843 and then united. He devised them to his sons, who made an equitable mortgage by deposit of the deeds of Y. and the probate of the will. The mortgagee believed, from the sons' statement, that the whole property was comprised. Held, that the property X. was not comprised in the equitable mortgage. *Jones v. Williams.* 47  
See MORTGAGE, 2, 3.

### ESTATE TAIL.

Devise to A. for life, with remainder to B. and his heirs, but if B. died in the life of A. "without leaving lawful issue," then immediately after the death of A. the lands were to be sold and the produce divided. And in case B. should outlive A., and die "without leaving any lawful issue," then the lands were to be sold by B.'s "executors" and the proceeds di-



vided. *B.* survived *A.* Held, that he took an estate tail, and not an estate in fee with an executory devise over, and therefore that he could make a good title to a purchaser. *Feakes v. Standley.*

Page 485

### EVIDENCE.

An affidavit was made in favour of the Plaintiff, who, after a long delay, filed it after the death of the witness, whereby no cross-examination could be had. A motion to take it off the file was refused, though the Court intimated that it would have less weight. *Abadom v. Abadom.*

243

See PRESUMPTION.

### WILL.

### EXCEPTIONS.

See DISCOVERY.

### EXECUTOR.

1. An executor fairly stating the facts, and paying over the assets under the direction of the Court, in an administration suit, is fully indemnified against all existing or contingent demands on the estate. *Waller v. Barrett.*
2. Principles on which the Court acts in giving an indemnity to executors against the outstanding leasehold covenants of their testators. *Ibid.*
3. Executors held, under the circumstances, entitled to no further indemnity against the leasehold covenants of the testator than the recognizance of the parties bene-

ficially entitled to his estate. *Waller v. Barrett.*

Page 413

4. If, after a decree, an executor thinks fit to pay a creditor, he does so at his own risk, and he is only entitled to stand in the place of his creditor against the estate. *Irby v. Irby.*
5. The testator had mortgaged his real estate to secure moneys held on the trusts of his marriage settlement. A suit was instituted to administer his estate and to realize the mortgage. After the decree (in 1832), the executors advanced considerable sums, out of the rents and personal estate, on account of interest, to the persons entitled to the mortgage. The estate proved deficient to pay all the creditors. Held (in 1857), that the payments could not be justified, that the executors must repay the amount, and be charged with interest on the balances composed of the money so improperly paid by them. *Ibid.*
6. Executors, under directions contained in the will, transferred legacies into the joint names of themselves and the infant legatees, and the residuary legatee received the clear residue. Ten years afterwards, a debt, of which the executors had been previously ignorant, was established against the estate. The residuary legatee being insolvent, and the legacies being still in the joint names and under the control of the executors: Held, that such legacies were liable to the payment of the

525

debt, both as against the legatees and a purchaser to whom one had assigned his legacy, whatever might be the rights of the legatees, or of the persons claiming under them, if any, as against the executors. *Noble v. Br. It.* Page 499

7. A purchaser of a legacy, which has been paid or delivered, cannot be called on to refund or pay any portion of a debt subsequently established against the testator's estate. *Semble. Ibid.*

#### EXECUTORY DEVISE.

*See ESTATE TAIL.*

#### EXECUTORY TRUST.

A testator devised to trustees, to the use of eight persons successively for life, and afterwards in trust to convey to all the sons and daughters of the eight who should be then living, and the heirs of their bodies "respectively, in a due course of entail;" and he empowered his sister to cut down the estates of children "thereafter born" of the eight to life estates. The Plaintiff was a child of one of the eight born at the date of the will. Held, that though the trust was executory, she was tenant in tail, and not tenant for life. *Randall v. Daniel.* 193

#### FEME COVERTE.

*See MORTGAGE.*

SPECIFIC BEQUEST.

SETTLED ESTATE, LEASE, AND  
SALES ACT.

#### FORFEITURE.

1. A builder agreed to take some land on a building lease, and to erect houses within a specified period, the landowner making him certain advances. There was a clause of forfeiture in default of their being completed within the time. Relief against a forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract. *Croft v. Goldsmid.*

Page 312

2. A clause of forfeiture in case of the devisee not making the mansion house "his usual and common place of abode and residence," is not void for uncertainty. *Wynne v. Fletcher.* 430
3. A testatrix devised an estate to A. for life, with divers remainders over. She provided that A., and every other person who should by her will "become possessed or entitled" to the estate, should make and use the mansion house as his "usual common place of abode and residence," and keep the same and the garden and demesne lands thereto belonging in a suitable and proper state of repair, condition and cultivation. And in case A., or any other person who should be so possessed or entitled, should refuse or neglect to reside at and make use of the mansion house as his common place of abode and residence, or should wilfully suffer the same to fall into decay, or should convert or alter the garden or demesne

lands to other purposes than those for which the same were then used and occupied, unless with the express consent of his trustees, then the limitation in his favour should cease. Held, that the trustees could not dispense with the condition as regarded residence, their power being limited to the case of an alteration of the garden and demesne lands. *Wynne v. Fletcher*.

Page 430

4. Whether, under such a condition, upon a forfeiture happening, the person next in remainder is bound to enter and reside, or can waive the forfeiture without himself forfeiting his own estate, *quære*. *Ibid*. See WAIVER.

#### FORMA PAUPERIS.

An order giving liberty to an infant, suing by a next friend, to proceed *in forma pauperis*, discharged, with costs, as irregular. *Lindsey v. Tyrrell*. 124

#### FRAUD.

The Defendant employed a stock broker to obtain a loan on the security of bonds, which were transferable by delivery. The broker, accordingly, borrowed a sum from the Plaintiff, but he wrongfully applied a part to his own use. The broker was unable to redeem the bonds, and the Defendant, with knowledge of the circumstances, promised and agreed to call and give the broker his cheque for the deficiency on receiving back the bonds. The

VOL. XXIV.

broker, acting on the faith of this promise, gave a crossed cheque to the Plaintiff, and redeemed the bonds. On the same day the Defendant, by a trick, obtained possession of the bonds without giving his cheque; and the broker's crossed cheque was consequently returned, and he became a defaulter. Held, that the Defendant was responsible to the Plaintiff for the fraud, and that the bonds in his hands were still liable to repay the Plaintiff his debt. *Mocatta v. Bell*. Page 585

See DIRECTORS.

STATUTE OF LIMITATION.

#### GENERAL ORDERS.

(32ND ORDER OF AUGUST, 1841.)

Two deceased trustees having committed a breach of trust by mortgaging, instead of selling the testator's real estate, and accounts of the estate being necessary, it was held that, notwithstanding the 32nd General Order of *August*, 1841, a suit could not be maintained to charge the estate of one trustee, and take the accounts, in the absence of the representative of the other. *Devaynes v. Robinson*. 86 See SERVICE ABROAD.

#### GOODWILL.

See PARTNERSHIP.

**HEIR.***See* ELECTION.*Will.***HUSBAND AND WIFE.**

1. Property of the wife, amounting to 17,000*l.* Consols, being already settled, the Court refused to settle a further sum of 2,000*l.* belonging to her, and directed it to be paid to the husband. *Spicer v. Spicer.*  
Page 365
2. The Court discourages applications to it involving the merits of petty squabbles between husband and wife. *Ibid.*

*See* DOWER.**SETTLEMENT.****ILLEGITIMATE CHILD.**

- A testator had only one illegitimate nephew (*John*), and only one legitimate nephew (*William*), and he had no nieces. By his will he gave a legacy to *John*, whom he described as "his nephew" and he gave his residuary estate "to the children lawfully begotten of his nephews and nieces." Held, that the children of *John* participated in the residue. *Tugwell v. Scott.* 141

**IMPLICATION.**

- Bequest to *A.* for life, and in case he should die without child or children, then to *B.* Held, that the children took nothing by implication. *Sparks v. Restall.* 218

**INDEMNITY.***See* EXECUTOR, 1, 2, 3.**INFANT.**

Where debts of a testator had been paid out of the income of the estate of an infant tenant in tail under his will, by the direction of the Court, after decree in an administration suit, and the tenant in tail subsequently died an infant, and his administrators, more than six years after taking out administration to him, filed a bill to revive the administration suit, for the purpose of having such payments recouped out of the *corpus* of the estate, and for payment of the costs of the administration suit: Held, first, that the payment, on behalf of the infant, having been made by the Court, a merger of the charge could not be presumed; and, secondly, that the pendency of the suit prevented such claim being barred by lapse of time. *Alsop v. Bell.* Page 451

*See* FORMA PAUPERIS.**INJUNCTION.**

1. The Defendants were by Act of Parliament authorized to make a short line uniting their main line with the Plaintiffs' line, but the 12th section prohibited the Defendants opening their main line until the junction should be completed. In default of the Defendants making the junction within a specified time, the Plaintiffs were authorized to make it. The Defendants proposed opening their

main line before the completion of the junction. Held, that the Plaintiffs had a sufficient interest to entitle them to an injunction to prevent this proceeding, and that it was not necessary to resort to an information for that purpose, and an injunction was granted, although the delay in opening the main line might be prejudicial to the public. *The Cromford and High Peak Railway Company v. The Stockport, Disley and Whaley Bridge Railway Company.* Page 74

2. The servant of a milkman, in C. street, London, agreed not to carry on the like business within three miles therefrom. Held, that this was not an undue restraint of trade, and the servant was restrained, by injunction, from violating his agreement. *Benwell v. Inns.* 307

#### INSOLVENT.

See STATUTE OF LIMITATION, 3.

#### INSUFFICIENCY.

See DISCOVERY.

#### INTEREST.

1. A solicitor took up his client's bills. Held, that these payments could only be treated in the same light as any other ordinary cash advances made by the solicitor for the benefit of his client, and that the solicitor was not entitled to charge interest thereon. *May v. Biggenden.* 207
2. A. B. was entitled to 7,000*l.* payable on the death of C. D. A. B.

by her will bequeathed legacies payable out of the 7,000*l.* C. D. survived A. B. thirty-three years. Held, that the legacies carried interest only from the death of C. D., and not from the death of the testatrix. *Earle v. Bellingham.* (No. 2.) Page 448

#### INTERROGATORIES.

See COSTS, 6.

PRACTICE, 2.

#### IRREGULARITY.

See EVIDENCE.

#### ISSUE.

See REQUEST.

#### JOINT TENANTS.

Two sisters carried on business as farmers. They had a joint account at their bankers, and an establishment and purse in common. They invested part of their money in the purchase of Consols in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes. Held, on the death of one, that the two sisters were joint tenants of the Consols, and tenants in common of the balance and of the deposit notes. *Bone v. Pillard.* 283  
See TENANTS IN COMMON.

#### JUDGMENT.

See PARTIES.

**JURISDICTION.***See* PROHIBITION.*SERVICE ABROAD.***LANDLORD AND TENANT.***See* PRINCIPAL AND SURETY, 1.**LAPSE OF TIME.***See* INFANT.**LEASE.***See* FORFEITURE, 1.**LEASEHOLDS.***See* EXECUTOR, 1, 2, 3.**LEGACY.***See* CONTINGENT LEGACY.**INTEREST.***WILL and its references.***LEGACY DUTY.**

Bequest to trustees of 2,000*l.* Consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession. Held, liable to legacy duty. *In re Pearce*. Page 491  
*See* DEMONSTRATIVE LEGACY.

**LEGAL PERSONAL REPRESENTATIVE.**

A testator, after the death of his daughter, gave real and personal estate to her "legal personal representative or representatives," to hold to them, their "heirs," executors, &c. according to the nature of the property. She left a husband, who took out administration, and an only child.

Held, that the husband took both the real and personal estate. *Dixon v. Dixon*. Page 129

**LEGATEE.***See* EXECUTOR, 6, 7.**ILLEGITIMATE CHILD.****LIEN.***See* MARSHALLING.**LIFE INTEREST.**

Bequest to a married woman "for the benefit of herself and such children as she then had or might thereafter have by her then husband, free from the control of her husband." Held, that she took for life, with remainder to such children. *Jeffery v. De Vitre*. 296  
*See* ABSOLUTE INTEREST.

**LONG ANNUITIES.**

1. Tenant for life of a residue, held, upon the terms of the will, entitled to enjoy long annuities *in specie*. *Skirving v. Williams*. 275
2. By partnership articles, the testator's capital was to remain in the concern for eighteen months after his death. The tenant for life of the residue was held, upon the terms of the will, entitled to the profits made during that period. *Ibid*.

**MANAGER.***See* ACCOUNT.**MARSHALLING.**

A trustee advanced to *A. B.* (one of his *cestuis que trust*) a part of the

trust funds, to enable him to purchase a real estate. *A. B.* died without having repaid the money, having devised the estate, and his personal estate was insufficient to pay his debts and legacies. Held, first, that there was a lien on the estate for the trust funds; and, secondly, that the pecuniary legatees had, as against the devisees, a right of marshalling, so as to have the lien satisfied, primarily, out of the purchased estate. *Birds v. Askey.* (No. 2.) Page 618

**MERGER.**

*See* INFANT.

**MESSENGER.**

The sheriff having taken bail upon an attachment, in a case not bailable, the Court directed a messenger to go. *Cowdray v. Cross.* 445

**MILKMAN.**

*See* AGREEMENT.

INJUNCTION.

**MINES.**

Mines being of a property of a speculative character, it is incumbent on parties setting up claims in respect of them to act speedily. *Clements v. Hall.* 333  
*See* POWER TO LEASE.

**MORTGAGE.**

1. Notwithstanding payment for twenty-three years, by a widow, of the interest on a void mortgage, created by her while *coverte*, it

was held, that her representatives were not precluded from disputing its validity. *Blandy v. Kimber.* Page 148

2. To constitute a good equitable mortgage it is not necessary that the deeds deposited should shew a good title in the depositor. *Roberts v. Croft.* 223

3. A solicitor made an equitable deposit of the title deeds of his estate to a client, omitting the conveyance to himself. He afterwards deposited the latter, as a security, with his bankers. Held, that the client had priority over the bankers. *Ibid.*

*See* BREACH OF TRUST.

BURIAL GROUND.

COSTS, 11.

EQUITABLE MORTGAGE.

NOTICE, 1, 3.

PARTIES.

POWER OF SALE.

TACKING.

**MORTMAIN.**

*See* CHARITY.

**NEPHEW.**

*See* ILLEGITIMATE CHILD.

**NEXT FRIEND.**

The next friend of a married woman having become insolvent, the proceedings were stayed. *D'Oechsner v. Scott.* 239

## NOTICE.

1. A mortgagee, who is informed that there are "charges" affecting the property, and is cognizant of two only, cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others. *Jones v. Williams.* Page 47
2. The rule with respect to the consequence of a purchaser abstaining from making inquiries, does not depend exclusively on a fraudulent motive for such abstinence. When the circumstances of a case put a purchaser on inquiry, a false answer, or a reasonable answer given to any inquiry, may dispense with the necessity of further inquiry; but where no inquiry has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry. *Ibid.*
3. A real estate belonged to three partners; one retired and conveyed his share to the two others, "subject to all charges and mortgages affecting the same," and the two made an equitable mortgage to the Defendants. There were three charges on the property, but the Defendants knew of two only, and made no inquiry as to there being more. Held, that having notice of the terms of the conveyance to the surviving parties, the Defend-

ants were bound to inquire whether there were any other charges, and not having done so, that they could not, as against the third equitable charge, insist on being purchasers for valuable consideration without notice. *Jones v. Williams.* Page 47

4. A change of the title of the firm in a banker's pass book, and entries therein to the credit of the new firm of the interest of securities given by the customer to the original firm, held to be notice of the assignment to the new firm of the securities given by the customer to the old firm. *Cavendish v. Geaves.* 163  
See BURIAL GROUND, 1.

## OUTLAWRY.

- A single plea of three outlawries allowed. *Fox v. Yates.* 271

## PARENT AND CHILD.

See ADVANCEMENT.

## PARTIES.

1. In a suit by a first mortgagee a sale was directed. The subsequent judgment creditors of the mortgagor were not parties. On an objection by a purchaser under the decree, Held, that the judgment creditors were not bound by the proceedings, and liberty was given to bring them before the Court. *Knight v. Pocock.* 436



2. The mortgagor had executed a creditors' deed, but the judgment creditors had not acceded to it. Held, that the trustees of the deed did not represent them under the 15 & 16 *Vict.* c. 86, s. 42, r. 9. *Knight v. Pocock.* Page 436  
See CLAIM.

COSTS, 10.

GENERAL ORDERS (32 Order of August, 1841).

TENANT IN TAIL.

### PARTITION.

- A partition by parol and separate possession cannot be questioned after being acted on for more than twenty years. *Paine v. Ryder.*

151

### PARTNER.

See AGENT, 2.

PARTNERSHIP.

### PARTNERSHIP.

1. If two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the two original partners; the terms and conditions of the partnership which bind them bind him, unless a new contract be made between them. And so also, if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified and involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original

partners with whom he associates himself. *Austen v. Boys.* Page 598

2. Solicitors agreed to become partners for seven years, and stipulated that, if either retired, the continuing partner should pay him the fair marketable value of his goodwill. One gave notice two days before the expiration of the seven years. Held, under these circumstances, that he was only entitled to the value of the goodwill as for two days, and not as of a going business. *Ibid.*
3. In 1839, a retiring partner stipulated with the continuing partners that they should, at a future period, take his grandson *T.* into the business. In 1846, the continuing partners entered into articles for seven years, and by one clause (which formed no part of the partnership contract prior to that time) it was stipulated that any partner might retire, and the continuing partners should then pay him the value of his share in the "goodwill." Afterwards, in 1849, *T.* was admitted, but the memorandum arranging his admission specified little more than the share he was to take, and it was agreed that it should not annul the articles of 1846 as between the former partners. *T.* had no notice of the stipulation as to retirement. Held, that *T.* was not bound by it, though the former partners were; and, assuming that under it the value of the goodwill was to be calculated as a perpetuity, still, that the arrangements of 1849 had cut it down

and limited it to so much of the seven years as were unexpired at the time of the notice to retire.

*Austen v. Boys.* Page 598

4. *A.* and *B.* were tenants from year to year of a mine, which they worked in partnership. *A.* died in 1847. *B.* continued to work the mine, and repudiated all claims of *A.*'s executrix to share in the profits, and she took no proceedings to enforce them, and in no way contributed to the expense of working the mine. The landlord gave *B.* notice to quit, and *B.* then entered into new arrangements. *B.* continued the working, and died in 1853. The Master of the Rolls held, in a suit instituted more than six years from *A.*'s death, that his estate was entitled to no portion of the profits except that attributable to the employment of his share of the plant. Lord *Cranworth* and Lord Justice *Turner* were of a different opinion, but the Lord Justice *Knight Bruce* was inclined to concur with the Master of the Rolls. *Clements v. Hall.* 333

See CROSS EXAMINATION.

TENANT IN COMMON.

#### PATENT.

A patentee, in 1853, assigned his patent, but the assignees omitted to register it under the 15 & 16 *Vict. c. 83, s. 35.* Afterwards, in August, 1855, the patentee assigned the patent to another person, who registered it on the same day.

The first assignees registered their assignment a week afterwards. The Court, in 1857, on the motion of the first assignees, ordered the register of the second assignment to be expunged, and with costs, under the 38th section. *Re Green's Patent.* Page 145

#### PAYMENT.

See ACCOUNTANT-GENERAL.

CHARITY, 5.

#### PERISHABLE PROPERTY.

1. A testator gave the residue of his estate and effects, in trust to pay "the annual proceeds to his wife" for life, and after her death, to divide "his said residuary estate and effects" between his nephews and nieces; and he directed that his nephews, in the division, should take such parts of the joint property as he held with them. Part of the joint property was leasehold. Held, that the tenant for life was entitled to enjoy the whole perishable property *in specie*. *Holgate v. Jennings.* 623
2. Where a tenant for life is entitled to enjoy *in specie*, the rule is, that investments may remain, but debts, as turnpike bonds, must be realized. *Ibid.*

See LONG ANNUITIES.

#### PHYSICIAN.

Attendance by a medical man on the deceased, held, under the circumstances, to have been gratuitous, and his demand, as a debt

against the assets, was rejected.  
*Packman v. Vivian.* Page 290

PLEA.

See OUTLAWRY.

PLEADING.

See DISCOVERY.

GENERAL ORDER.

OUTLAWRY.

PARTIES.

REVIVOR.

POSSESSION.

*Prima facie* taking possession, after an abstract has been delivered, and not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, and it lies on the purchaser to rebut that presumption. *Bown v. Stenson.* 631  
See WAIVER.

POWER.

See APPOINTMENT.

SPECIFIC BEQUEST.

POWER OF SALE.

A power to raise money by sale or mortgage, held to authorize a mortgage with a power of sale. *Bridges v. Longman.* 27

POWER TO LEASE.

An estate, with the "mines and minerals," was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, &c., but so as the lessees should not be "dispunishable for waste." Held, that the last clause

was repugnant, and that the trustees might demise mines, both opened and unopened at the date of the settlement. Held, also, that the royalty reserved by the lease was in the nature of rent, and was payable to the tenant for life, and did not form *corpus*. *Daly v. Beckett.* Page 114

PRACTICE.

1. Whether any part of the evidence in chief can be taken orally, on a motion for a decree, *quare*. *Pellett v. Nicholls.* 298
2. A Plaintiff had required the attendance of a Defendant to be cross-examined on his affidavit. He attended, but it was held that he was entitled to his expenses as a witness. The Plaintiff then abandoned this course of proceeding, and filed interrogatories for the Defendant's examination. Held, that this could not be done until the costs of the former proceeding had been paid. *Davey v. Durrant.* 411

See ABATEMENT.

ACCOUNTANT-GENERAL.

CHAMBERS.

CHARITY.

CLAIM.

COSTS.

CREDITORS' SUIT.

CROSS EXAMINATION.

DECREE.

DISCOVERY.

DISMISSAL FOR WANT OF PROSECUTION.

FORMA PAUPERIS.

## PRACTICE—continued.

See GENERAL ORDERS.

MESSENGER.

MOTION FOR DECREE.

NEXT FRIEND.

SECURITY FOR COSTS.

SETTLED ESTATES LEASES AND  
SALES ACT, 1, 2.

## PRECATORY WORDS.

The testator gave his residuary real and personal estate to his widow, "to and for her own sole use and benefit for ever, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly and equitably amongst my two daughters and their children," and he appointed her sole executrix and residuary legatee. Held, that the widow took beneficially for life, with remainder to the two daughters and their children, as she should appoint; but the Court refrained from declaring how the property would devolve in default of appointment. *Gully v. Cregoe*.  
Page 185

## PREROGATIVE.

1. This Court will enforce, for the benefit of the Crown, a trust of real estate created in favour of an alien. The devise being valid, and there being a *cestui que trust* who can take, but not hold, the Crown becomes entitled beneficially, and not the trustee or heir at law. *Barrow v. Wadkin*. 1
2. *Ritson v. Sturdy* (3 *Smale & Giffard*, 230) dissented from. *Ibid*.

## PRESUMPTION.

1. There is a presumption against persons who keep back a document, and against whom the evidence is to be taken most strongly. *Attorney-General v. Dean and Canons of Windsor*. Page 679
2. A deed of 1559 presumed, under the circumstances, to have been executed by Queen *Elizabeth*. *Ibid*.

## PRINCIPAL AND SURETY.

1. The Plaintiff was surety, upon a promissory note to the Defendants, for a sum lent by them to their tenant, and the Defendants also took a mortgage of the tenant's furniture for the same debt. They afterwards, under a distress, took the same furniture for an arrear of rent. Held, that, as regarded the Plaintiff (the surety), the produce of the furniture was first applicable to the payment of the promissory note, and that the landlords could not, as against the surety, apply it in payment of the rent. *Pearl v. Deacon*. 186
2. A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not. *Ibid*.

## PRIORITY.

See MORTGAGE, 3.

TACKING.

## PROHIBITION.

This Court discourages applications in Term for a prohibition, even though the proceeding has origi-

nated here in Vacation. *Re Michael Foster.* Page 428

PUBLIC COMPANY.

1. The managing committee of a projected railway company are, as well as the directors after its formation, not the mere agents of the shareholders, but their trustees, and liable to account as such. *Williams v. Page.* 654
2. When the managing committee of an abortive company have rendered their accounts, and divided the money in their hands, without consent or remonstrance on the part of the shareholders, the Court would not, three or four years afterwards, decree an account against them. *Ibid.*
3. Provisional directors professed to the shareholders that they had themselves taken 3,800 additional shares, and paid the deposit, in order to provide the deposit required by the Standing Orders. The money was advanced by eleven of the provisional committeemen and three others. The project failed, and the money was returned in full to the persons who had advanced it. Held, that this was a fraud on the company, and that the money must be restored; but held also, that the relief could not be had in the absence of the three. *Ibid.*

See COMPULSORY POWER.

COSTS, 7.

CONTRIBUTORY.

DIRECTORS.

RAILWAY.

RAILWAY.

1. The Defendants were by Act of Parliament authorized to make a short line uniting their main line with the Plaintiffs' line, but the 12th section prohibited the Defendants opening their main line until the junction should be completed. In default of the Defendants making the junction within a specified time, the Plaintiffs were authorized to make it. The Defendants proposed opening their main line before the completion of the junction. Held, that the Plaintiffs had a sufficient interest to entitle them to an injunction to prevent this proceeding, and that it was not necessary to resort to an information for that purpose, and an injunction was granted, although the delay in opening the main line might be prejudicial to the public. *The Cromford and High Peak Railway Company v. The Stockport, Disley and Whaley Bridge Railway Company.* Page 74
2. An agreement entered into between a landowner and the promoters of a bill in Parliament authorizing the construction of a railway, held, not binding on the company after its incorporation, the company having done no act to adopt it. *Williams v. The St. George's Harbour Company.* 339
3. Whether an agreement to buy off the opposition of a landowner to a railway bill before Parliament can be supported, *quære.* *Ibid.*  
See PUBLIC COMPANY.

## REDEMPTION.

*See* COSTS, 11.

REGISTER OF PROPRIETORS  
OF PATENT.

*See* PATENT.

## RELEASE.

*See* USURY.

## REMAINDERMAN.

*See* TENANT IN TAIL.

## RESULTING TRUST.

There is a resulting trust in the grantor where lands are conveyed on charitable trusts to be afterwards declared, and no subsequent declaration is made. *Attorney-General v. Dean and Canons of Windsor.* Page 679

## REVERSION.

*See* INTEREST, 2.

## REVIVOR.

1. The right to revive an administration suit after decree is not barred by lapse of time, but the Court exercises a discretion, and in cases of gross negligence or laches may refuse to allow the suit to be revived. *Alsop v. Bell.* 451
2. Where a decree to establish a will against the heir, and for administration of the real and personal estate under it, had been made in 1835, and actively prosecuted down to 1845, and the further prosecution of it had then been interrupted by the institution of an ejectment suit by a person

claiming as tenant in tail under a prior will, who afterwards compromised such claim in 1851 by giving 25,000*l.* for the estate: Held, that an original bill, in the nature of a supplemental bill, filed against him in *May*, 1855, for the purpose of reviving and carrying on the prior suit for administration of the estate, was not barred by lapse of time. Held, also, that notwithstanding the ejectment suit had been abandoned as against the Plaintiff in the bill of revivor, who was a Defendant to it, the Court would not revive the decree in the administration suit, so far as it established and sought to carry out the trusts of the later will, without directing an issue to try the validity of that will. But that, upon the Plaintiff in the bill of revivor consenting to admit, for the purposes of that suit, that the prior will was the last will, the Court would revive the administration decree, so far as it sought administration simply without reference to either will. *Alsop v. Bell.* Page 451

## SALE.

*See* BREACH OF TRUST, 1.

## SCHEME.

*See* CHARITY, 5.

## SCOTLAND.

*See* SERVICE ABROAD.

SECURITY FOR COSTS.

- A Plaintiff having gone abroad on matters connected with the suit, was ordered to give security for costs, but having returned to this country, the order was discharged. *O'Conner v. Sierra Nevada Company.*

Page 435

SERVICE ABROAD.

- A Scotchman died in *London* possessing large real and personal estate in *Scotland*, and a comparatively very small personal estate in *England*. The Plaintiff, resident in *Scotland*, filed a bill against the four trustees, three of whom resided in *Scotland*, to administer the real and personal estate, and obtained an order, under the 33rd Order of *May*, 1845, to serve the three trustees in *Scotland*. A motion to discharge that order was refused, it not being the proper time to raise the question, and there being a case for the exercise of the jurisdiction of this Court. *Meiklan v. Campbell.*

100

SET-OFF.

1. Principles stated as to the right of set-off, where a bond is given by a customer to his bankers, in the following different instances: 1st, where the firm remains unaltered; 2nd, where it is changed; 3rd, the bond is assigned to the new firm; 4th, where it is assigned to a stranger; 5th, where notice of the assignment is given; and 6th, where it is omitted to be given. *Cavendish v. Geaves.* 163
2. If a customer borrows money from his bankers, and gives a bond to secure it, and afterwards, on his general banking account, a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond exists, both at law and in equity. *Cavendish v. Geaves.* Page 163
3. If the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if, after this, a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the *chose in action* would be inoperative at law, and the obligees of the bond, and the debtor on the general account, would be different persons; but as in equity the persons entitled to the bond, and the debtors on the general account, would be the same persons, a right of set-off would exist in this Court, and the customer would in equity be entitled to set off the balance due to him against the bond debt due from him. *Ibid.*
4. If, after the bond had been given, it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger

before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter of account were brought here, as the assignees of the *chose in action* would be bound by the equities affecting their assignors. *Cavendish v. Geaves*.

Page 163

5. But if notice of that assignment had been given to the original debtor, no right of set-off would exist in this Court for the balance subsequently due from the bankers to the obligor, because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account, with whom he had continued to deal. *Ibid*.
6. If the assignment of the bond had been made to the new firm, with notice to the obligor, they would, if debtors on the general account, be liable to the same rights in equity of set-off as if they had been the obligees. *Ibid*.
7. If, after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity, as against the first assignees, of whose assignment he had notice; and the se-

cond assignees would, in equity, be bound by it, because the assignees of the bond take it subject to all the equities which affect the assignors. *Cavendish v. Geaves*.

Page 163

8. Bankers, to whom a customer had given a bond, assigned it over to third parties, who gave no notice to the obligor. Held, that notwithstanding the assignment, the customer's right continued, of setting off moneys due to him from his bankers against the bond. *Ibid*.

#### SETTLED ESTATES LEASES AND SALES ACT.

1. Practice under the Settled Estates Leases and Sales Act. *Re Brealy's Settled Estates*. *Re Hadwen's Settled Estates*. *Re Manson's Settled Estates*. *Re Foster's Settled Estates*. 230
2. Where a married woman is the Petitioner, her consent, under the 19 & 20 Vict. c. 120, ss. 37, 38, should be taken subsequent to the petition being answered, but before any further proceeding, and an independent solicitor should take her consent. *Ibid*.

#### SETTLEMENT.

Invalidity of a parol agreement of the husband prior to marriage to settle his wife's property. *Spicer v. Spicer*. 365

#### SEWERS, COMMISSIONERS OF.

*See Costs*, 7.



**SOLICITOR AND CLIENT.**

*See* ATTORNEY AND CLIENT.

INTEREST, 1.

TAXATION.

**SPECIFIC BEQUEST.**

A married woman died in 1849 possessed of savings of her separate estate, amounting to 697*l.*, and having power of appointment over 21,000*l.* Consols, subject to her husband's life interest. By her will she directed, "first," that all her debts should be paid, and she then specifically bequeathed all her ready money. Her debts were paid out of the 697*l.* Held, on the death of her husband, in 1855, that the specific legatee was entitled to be repaid the 697*l.* out of the fund over which she had a power of appointment. *Laing v. Cowan.*

Page 112

**SPECIALTY DEBT.**

*See* CONTRIBUTION.

**SPECIFIC LEGACY.**

*See* DEMONSTRATIVE LEGACY.

**SPECIFIC PERFORMANCE.**

*See* DIRECTORS.

**STATUTES.**

13 *Geo.* 3, c. 21, s. 3.

*See* ALIEN, 2.

57 *Geo.* 3, c. xxix.

*See* COSTS, 7.

3 & 4 *Will.* 4, c. 27.

*See* STATUTE OF LIMITATION, 2, 3.

3 & 4 *Vict.* c. 113.

*See* ECCLESIASTICAL COMMISSIONERS.

13 & 14 *Vict.* c. 60.

*See* TRUSTEE ACT.

15 & 16 *Vict.* c. 55.

*See* TRUSTEE RELIEF ACT.

15 & 16 *Vict.* c. 85, s. 2.

*See* BURIAL GROUND.

15 & 16 *Vict.* c. 86, s. 38.

*See* CROSS EXAMINATION.

15 & 16 *Vict.* c. 86, s. 42, r. 9.

*See* PARTIES.

16 & 17 *Vict.* c. 51.

*See* SUCCESSION DUTY.

**STATUTE OF LIMITATIONS.**

1. A fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone, they, in 1843, transferred it to his account, and thereby obtained payment of a debt due from him to them. Held, that the trustees might sue the bankers in this Court to have the trust fund replaced, and that the Statute of Limitations was inapplicable. — *Bridgman v. Gill.* Page 302
2. A testator devised his real estate to trustees for a term of 5,000 years, to raise the deficiency of his personal estate to pay his debts and legacies, and which term was to cease on the performance of the trusts; subject thereto he devised it to his son in fee. In 1807 the son conveyed his estate to a creditor (*A. B.*), in trust, by sale or mortgage, to raise and pay the debt. In 1811 a suit was insti-

tuted to administer the testator's real and personal estate, but *A. B.* was not made a party until 1841. He took no steps to realise his security, and obtained no payment or acknowledgment. The estate was sold, and the surplus was in Court. Held, in 1857, that *A. B.*'s claim was barred by the Statute of Limitations, and that it was not protected either by the prior term or the pending litigation. *Humble v. Humble.* Page 535

3. In 1825, *A. B.*, on his insolvency, omitted from his schedule, which he verified on oath, an estate to which he was entitled. In 1853, his assignee filed his bill against the assignees under a subsequent bankruptcy and others for the recovery of the property. Held, that the claim was not barred by the Statute of Limitations, the case coming within the exception of the 26th section of the 3 & 4 Will. 4, c. 27, there having been "a concealed fraud." *Sturgis v. Morse.* 541

#### SUBSTITUTIONAL GIFT.

Bequest to *A.* for life, and after her death, to *B.* and *C.* "or" their children. *B.* and *C.* survived *A.* Held, that their children took nothing. *Sparks v. Restal.* 218

#### SUCCESSION DUTY.

*A.*, the tenant for life, and *B.*, his nephew, and tenant in tail, entered into an arrangement, by which they barred the entail, and conveyed the property to such uses as they

should jointly appoint, and subject thereto to the old uses. By a contemporaneous deed, in execution of the joint power, *A.* secured to *B.* a life annuity on the property, and *B.* secured 25,000*l.*, payable when he, *B.*, came into possession. Of this, 20,000*l.* was settled, contemporaneously, on *A.*'s daughters, and the remainder on *A.* Held, on the death of *A.*, in 1855, that succession duty, (under the act of 1853,) was payable on the 20,000*l.* as a succession from *A.*, but that no succession duty was payable on the remaining 5,000*l.* *Re Jenkinson.* Page 64

#### SURETY.

See CONTRIBUTION.

#### SURGEON.

See PHYSICIAN.

#### SURPLUS RENTS.

See CHARITY, 3, 4, 6, 7.

#### SURVIVORSHIP.

1. Bequest, after a life estate, to *A.*, *B.* and *C.* equally, "or in case of the demise of each or either of them, to be divided between the survivors or survivor, or their representatives." All three died in the life of the tenant for life. Held, that this being an alternative gift, their representatives were entitled to the fund. *Page v. May.* 323
2. The case of *McDonald v. Brice*, 16 Beav. 581, overruled. *Ibid.*

**TACKING.**

The owner mortgaged first to *A.*, secondly to *B.*, and he then conveyed to *C.* "in trust" to sell and pay *A.* and a debt due to *D.*, and another due to *C.*, and the residue to the owner. *C.*, who had no notice of *B.*'s mortgage, afterwards got a transfer of *A.*'s mortgage, and with it the legal estate. Held, that *C.* was entitled to tack the third charge to the first mortgage, and exclude *B.* *Spencer v. Pearson.* Page 266

**TAX.**

See CHARITY, 1.

LEGACY DUTY.

SUCCESSION DUTY.

**TAXATION.**

Less than one-sixth was taken off a bill of costs on taxation, but more than one-sixth was taken off in the suit (which was one for a general account between the solicitor and client), but on other grounds, into which the Taxing Master could not enter. The costs of taxation were allowed to the solicitor. *May v. Biggenden.* 207

**TENANT FOR LIFE AND REMAINDERMAN.**

A testator gave 16,000*l.* in legacies payable within six months, and the residue to his widow for life, with remainder over. He died possessed of a large sum in the Consols. The widow, who was executrix, received the first half-yearly dividends on the Stock, and then

VOL. XXIV.

sold sufficient to pay the legacies. Held, that she was not entitled, as tenant for life, to the dividends on the Stock producing the 16,000*l.*, but that it formed *corpus*. *Holgate v. Jennings.* Page 623

See LONG ANNUITIES.

PERISHABLE PROPERTY.

POWER TO LEASE.

**TENANT IN COMMON.**

A testator devised real estates to trustees for 500 years, in trust to pay life annuities, and the residue of the rents to his two sons, "in equal shares;" and, subject thereto, to his two sons in fee as joint tenants. Held, that during the term they were tenants in common, and, secondly, that the employment by the two sons of the estates in their partnership trade had not the effect of making them tenants in common of the fee. *Brown v. Oakshot.*

254

See JOINT TENANT.

**TENANT IN TAIL.**

1. Parties in remainder held not bound by the proceedings in a suit to which the prior tenant in tail was a party, he having no interest to protect, and not having protected the interest of such remaindermen. *Alsop v. Bell.* 451
2. A testator made two wills, one in 1815 and the other in 1818; under both *A. B.* (an infant) was first tenant in tail, but the first tenant in remainder was *Thomas* under the first and *William* under the

3 c

second will. In a suit against the tenant in tail, the heir and *William* the second will was established. *A. B.* died an infant, and without issue. Held, that though the inheritance was represented in the suit, *Thomas* was not bound by the decree, the suit expressly negating his right, and he not being a party thereto. *Alsop v. Bell*, p. 451  
See EXECUTORY TRUST.

INFANT.

#### TITLE.

See WAIVER, 2.

#### TRUST.

A fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone, they, in 1843, transferred it to his account, and thereby obtained payment of a debt due from him to them. Held, that the trustees might sue the bankers in this Court to have the trust fund replaced, and that the Statute of Limitations was inapplicable. *Bridgman v. Gill*. 302

See ADVANCEMENT.

ALIEN, 1.

BREACH OF TRUST.

EXECUTORY TRUST.

RESULTING TRUST.

TRUSTEE.

#### TRUSTEE.

Property was settled to the separate and inalienable use of a married woman for life, and the trustees

were authorized, out of the moneys which should come to their hands, to reimburse themselves all expenses to be incurred in or about the execution of the trusts or any matter relating to the settlement. A bill filed by her next friend, complaining of a breach of trust, and to remove the trustees, was dismissed with costs, but, by consent, new trustees were to be appointed, and a Receiver to get in the income. Before new trustees had been appointed and the costs paid by the next friend, he became insolvent. Held, that the income in the hands of the Receiver was applicable to the payment of the trustees' costs. *D'Oechsner v. Scott*. Page 239  
See ALIEN.

BREACH OF TRUST.

PUBLIC COMPANY.

TRUST.

#### TRUSTEE RELIEF ACT.

The Trustee Act held to apply to a case in which the executor of a surviving trustee had not proved the will and had neglected to transfer Stock on the requisition of new trustees appointed out of Court. *Re Ellis' Settlement*. 426

#### TRUSTEE ACT.

The Court directed the circumstances bringing a case within the Trustee Act to be inserted in an order vesting the right to transfer Stock. *Re Ellis' Settlement*. 426

UNDUE INFLUENCE.

Observation on the application of the doctrine of undue influence. *Fowler v. Wytt.* Page 232

USURY.

An account between *A.* and *B.* having been settled, *A.* executed a general release to *B.* Held, that the account could not be opened by *A.*, on the ground of usury, until the release had been set aside, and that the release could not be set aside on the mere ground of usurious items having entered into the account, of which both parties were cognizant. *Fowler v. Wytt.* 232

VENDOR AND PURCHASER.

See COSTS, 1.

POSSESSION.

WAIVER.

VESTING.

A testator devised his real and personal estate in trust for his wife for life, and after her decease, he devised a real estate to his brother for life, with remainder to his children. He proceeded thus:— and as to the residue of my estate and effects “not hereinbefore disposed of, or which may remain after satisfying the trusts of this my will,” I give the same to my brother (if then living), his heirs, &c. “But in case my brother shall then be dead, then and in such case I give” the residue of my estate and effects to his

children. The brother died in the life of the widow. Held, that the residue vested in him at the testator's death. *Birds v. Askey.* (No. 1.) Page 615

VICAR.

See ACCOUNTANT-GENERAL.

VOUCHERS.

See AGENT.

WAIVER.

1. In a Crown lease, the lessee covenanted not to convert the premises into a shop or place of sale of any kind, without consent of the Commissioners of Woods and Forests. The trade of an engraver had been carried on in it, without consent or objection, but rent had afterwards been received. Held, that the forfeiture had been waived, and that the title was good. *Bridges v. Longman.* 27
2. A purchaser had taken possession, by his tenant and not under the contract, after an abstract had been delivered, and he had made no objection to the title till long after, when a suit was threatened, and he had promised payment of part of the purchase-money: Held, that by his conduct and on the correspondence, he had waived all objections to the title arising upon that abstract; but held, secondly, that he had not waived any objection not arising on the abstract. *Bowen v. Stenson.* 631

## WASTE.

*See* COPYHOLD, 2.

POWER TO LEASE.

## WILL.

Under the old practice, a disputed will could not be proved *visd voce* at the hearing; but liberty was given, under the new practice, to prove a will in Court, and the heir was allowed to cross-examine the witnesses. *Chichester v. Chichester*. Page 289

*See* ABSOLUTE INTEREST.

ANNUITY.

BEQUEST.

CONSTRUCTION.

CONTINGENT LEGACY.

COPYHOLD.

DEMONSTRATIVE LEGACY.

DEVISE.

ELECTION.

ESTATE TAIL.

FORFEITURE.

ILLEGITIMATE CHILD.

WILL—*continued*.

IMPLICATION.

INTEREST, 2.

LEGACY DUTY.

LEGAL PERSONAL REPRESENTATIVES.

LIFE INTEREST.

LONG ANNUITIES.

MARSHALLING.

PERISHABLE PROPERTY.

PRECATORY WORDS.

SPECIFIC BEQUEST.

SUBSTITUTIONAL GIFT.

SURVIVORSHIP.

TENANT FOR LIFE AND REMAINDERMAN.

TENANT IN COMMON.

VESTING.

## WINDING-UP.

*See* CONTRIBUTORY.

## WITNESS.

*See* CHAMBERS.

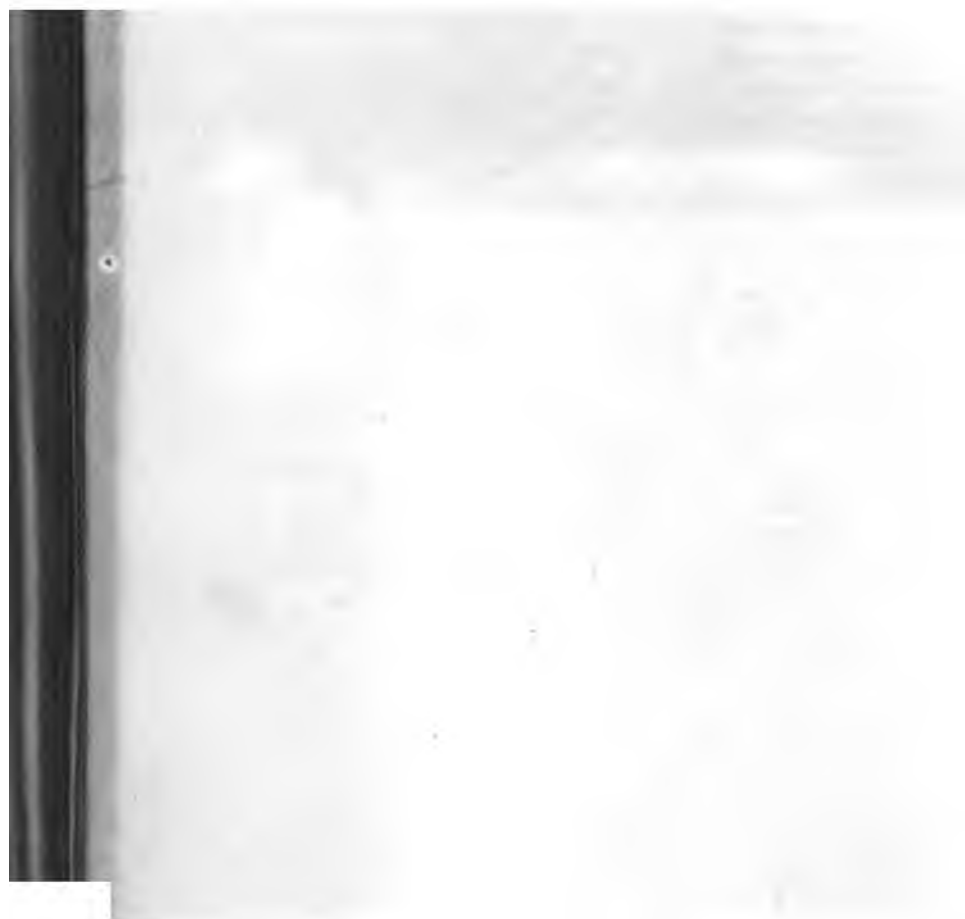
COSTS, 6.

CROSS-EXAMINATION.

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